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No. 87-

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT, CITY OF NEW YORK, NATIONAL LEAGUE OF CITIES, and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether under section 623 of the Cable Communications Policy Act of 1984, the Federal Communications Commission properly determined that state and local governments may not regulate basic cable service rates charged by cable systems in any community where three over-the-air broadcast signals are theoretically available — a determination that in effect deregulates such rates in more than 90 percent of the communities in the United States served by cable — on the ground that such cable systems face "effective competition"?

LIST OF ALL PARTIES

In addition to the parties identified in the caption of this case, there were a number of other petitioners in the United States Court of Appeals. These were: Cable Television Access Coalition, Inc.; County of Contra Costa, California; Guam Cable T.V.; National Federation of Local Cable Programmers and the New York Citizens' Committee for a Responsible Media; Satellite Television Industry Association, Inc./(SPACE).

The following parties were intervenors in the Court of Appeals: Adams-Russell Cable Services Division of Adams Russell; Arizona Cable Television Association; Association of Independent Television Stations, Inc.; BellSouth Corporation; Board of Supervisors of Fairfax County, Virginia; Cellular Telecommunications Division of Telocator Network of America; Centel Corporation; Gary L. Christensen; City of Athens, Ohio; City of Dubuque, Iowa; City of Los Angeles, California; City of Miami, Florida; Cities of Sunnyside and Grandview, Washington and the City of Southfield, Michigan; Cox Cable Communications, Inc.; Direct Satellite Communications, Inc.; Gill Industries and Western Communications, Inc.; Eagle Telecommunications, Inc./Colorado; Harron Communications Corporation; Maximum Service Telecasters, Inc.; Media General Cable of Fairfax County, Inc.; National Association of Broadcasters; National Association of State Cable Agencies; National Cable Television Association, Inc. and Community Antenna Television Association; North Carolina CATV Association; Office of Communication of the United Church of Christ; Post-Newsweek Cable, Inc.; Tele-Communications, Inc.; Texas Cable TV Association; Time Incorporated; and United Cable Television Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 15

THE FCC COMMITTED PROCEDURAL AND SUBSTANTIVE ERRORS THAT WILL HAVE PERVASIVE NATIONWIDE IMPACT, WILL PREEMPT STATE AND LOCAL GOVERNMENTS OF TRADITIONAL CABLE RATE REGULATION POWERS, AND WILL EXPOSE CABLE SUBSCRIBERS TO MONOPOLY PRICING 15

1. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Requires Agencies To Construe Statutes In Accordance With The Unambiguously Expressed Intent Of Congress 15

2. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Requires Agencies To Consider All Relevant Factors And Explain Departures From Longstanding Policies 18

TABLE OF CONTENTS (continued)

Page

3. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Prohibits An Agency From Relying On Studies Which Are Irrelevant, Undisclosed, Or Lacking Statistical Validity 20

CONCLUSION 21

TABLE OF AUTHORITIES

Court Cases: **Page**

Almay v. Califano, 569 F.2d 674 (D.C. Cir. 1978) 20

American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981) 16

Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281 (1974) 18

Bowen v. American Hospital Association, 106 S.Ct. 2101 (1986) 20

Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) 6

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18

Community Cable TV, Inc., 98 FCC 2d 1180 (1980) 6

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 16

Cox Cable New Orleans, Inc. v. City of New Orleans, 594 F.Supp. 1452 (E.D. La. 1984), *vacated without opinion* (E.D. La. Dec. 16, 1985) 6

Direct Marketing Association, Inc. v. United States Postal Service, 778 F.2d 96 (2d Cir. 1985) 18

Friedman v. Adams Russell Cable Services — New York, Inc., 624 F.Supp. 1195 (S.D.N.Y. 1986) 5

TABLE OF AUTHORITIES (continued)

Court Cases: **Page**

Housatonic Cable Vision v. Dept. of Public Utility, 624 F. Supp. 798 (D. Conn. 1985) 19

Immigration and Naturalization Service v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987) 17

Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 18

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 17-18

National Black Media Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986) 20

Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968) 18

Portland Cement Association v. Ruckelhaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) 20

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 16

St. James Hospital v. Heckler, 760 F.2d 1460 (7th Cir.) *cert. denied*, 106 S.Ct. 229 (1985) 20

Steadman v. SEC, 450 U.S. 91 (1981) 16

United States v. Brown Shoe Co., 370 U.S. 294 (1962) 12

United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) 20

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 7

TABLE OF AUTHORITIES (continued)

Statutes: **Page**

Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (Supp. 1987) ..... *passim*

Section 601(2), 47 U.S.C. § 521(2) 8, 9, 19

Section 601(6), 47 U.S.C. § 521(6) 8

Section 602(2), 47 U.S.C. § 522(2) 9, 13, 14, 16

Section 602(4), 47 U.S.C. § 522(4) 13

Section 602(6), 47 U.S.C. § 522(6) 9, 13, 17

Section 621(a)(3), 47 U.S.C. § 541(a)(3) 8

Section 623, 47 U.S.C. § 543 ..... *passim*

Administrative Regulations and Materials:

Report and Order in MM Docket No. 84-1296, 50 Fed. Reg. 18,637 (1985) (released April 19, 1985) 11, 12, 13

Memorandum Opinion and Order in MM Docket No. 84-1296, 51 Fed. Reg. 21,770 (1985) (released June 16, 1985) 13

Notice of Proposed Rulemaking in MM Docket No. 84-1296, 49 Fed. Reg. 48,765 (Dec. 14, 1984) 9, 10

Fourth Report and Order, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorization Therefor, 95 FCC 2d 554 (1983) 19

TABLE OF AUTHORITIES (continued)

Administrative Regulations and Materials: **Page**

Notice of Proposed Rulemaking, International Competitive Carrier Policies, 100 FCC 2d 1270 (1985) 12, 19

Notice of Proposed Rulemaking, Decreased Regulation of Certain Basic Telecommunications Services, 2 FCC Rcd 645 (1987) 19

Legislative Materials:

H.R. Rep. No. 934, 98th Cong. 2d Sess. (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 7, 8, 9, 17

129 Cong. Rec. § 8326 (daily ed. June 14, 1983) 17

130 Cong. Rec. H10,435 (daily ed. Oct. 1, 1984) 7

130 Cong. Rec. H10,444 (daily ed. Oct. 1, 1984) 6

130 Cong. Rec. S14,284 (daily ed. Oct. 11, 1984) 7

Miscellaneous:

"Cable Stats," *Cablevision,* Sept. 28, 1987, at 64 5

"Cable TV," *Consumer Reports,* Sept. 1987, at 547 4–5

H. Hovenkamp, *Economics and Federal Antitrust Law* 57 (1985) 12

Kwoka, "The Effect of Market Share Distribution in Industry Performance," *Review of Economics & Statistics,* Vol. XLI, No. 1, Feb. 1979, pp. 101–09 12

National League of Cities Comments to FCC MM Docket No. 84-1296 3

Posner & Easterbrook, *Antitrust: Cases, Economic Notes and Other Material* (Supp. 1984) 12

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on July 17, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit upholding, in large measure, the FCC's rule deregulating basic cable service rates in most communities throughout the United States is reported at 823 F.2d 1554 and is reprinted in the Appendix at page A115.

The FCC's *Report and Order* adopting the rule under review in this proceeding is published at 50 Fed. Reg. 18,637 (May 2, 1985) and is reprinted in the Appendix at page A1. The *Report and Order* was later modified by the FCC's *Memorandum Opinion and Order* published at 51 Fed. Reg. 21,770 (June 16, 1986) and reprinted in the Joint Appendix at page A96.

JURISDICTION

The judgment of the Court of Appeals was entered July 17, 1987. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition has been filed within the time allowed by law.

STATUTORY PROVISIONS

The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) is codified at 47 U.S.C. § 521 *et seq.* (Supp. 1987). Relevant portions of the Cable Act are reprinted in the Appendix at page A186.

STATEMENT OF THE CASE

(1)

This appeal raises the question whether the Federal Communications Commission has the power, after enactment of the Cable Communications Policy Act of 1984, to deregulate basic cable service rates in more than 90 percent of the communities in the United States served by cable.

Section 623 of the Cable Act prohibits regulation of basic cable service rates wherever cable systems are subject to "effective competition." 47 U.S.C. § 543(a), (b)(1). In April 1985, the Federal Communications Commission (FCC) promulgated a rule defining "effective competition" for a cable system as the theoretical availability of three over-the-air broadcast signals somewhere in the franchise territory served by the cable system, irrespective of the number and nature of programming services offered over the cable system. Because almost every community served by cable has at least three theoretically available broadcast signals, the FCC's rule in effect deregulates basic cable service rates in the overwhelming majority of cabled communities in the United States. *See* National League of Cities Comments to FCC MM Docket No. 84-1296, Appendix III at 19, ¶ 30-31.

Petitioners, along with other state and local governments and citizen groups, challenged the FCC's rule in the United States Court of Appeals for the District of Columbia Circuit, contending that it exceeded the FCC's authority under the Cable Act and was arbitrary and capricious. With limited exceptions not relevant here, the Court of Appeals rejected that challenge. Petitioners here contend that the Cable Act required the FCC to promulgate a rule defining "effective competition" for a cable system that at least required consideration of whether competition existed for "basic cable service" as that term is statutorily defined; that the FCC improperly ignored a relevant factor — antitrust market analysis; and that it erroneously relied upon three flawed studies in

promulgating its "effective competition" rule. The net result of these errors, in petitioners' view, is that the FCC has put into effect a rule that overlooks unambiguous Congressional intent and improvidently deprives state and local governments of their traditional authority to protect cable subscribers from monopoly pricing.

(2)

There are approximately 7800 cable systems in the United States. "Cable TV," *Consumer Reports,* Sept. 1987, at 547–48. Improvements in distribution technology over the past decade have greatly expanded the range of programming services available to the average cable subscriber. Most cable subscribers are now served by cable systems offering at least 30 channels of video programming services, many of which are delivered via satellite from distant sources. Over 50 satellite-delivered programming services are available to cable systems throughout the United States. *Id.* These satellite-delivered programming services offer video programming largely unavailable from over-the-air broadcast television, including channels featuring recent theatrical or made-for-cable movies (e.g., Home Box Office, Showtime), cultural programming (e.g., Bravo, Arts & Entertainment), children's programming (e.g., the Disney Channel, Nickolodeon), musical programming (e.g., MTV, the Nashville Network), exclusive sports coverage (e.g., ESPN, Home Sports Team), other special-audience programming (e.g., the Discovery Channel, Black Entertainment Television), 24-hour news and weather services (e.g., Cable News Network, the Weather Channel), 24-hour public affairs services (e.g., C-SPAN), and even distant broadcast signals known as superstations (e.g., WTBS-Atlanta, WGN-Chicago). *Id.* at 549–50. In addition, about one-fifth of all cable systems also offer local public, educational, and governmental ("PEG") access channels that televise local government hearings, classroom instruction, and programs featuring community groups. *Id.* at 550. Altogether, cable subscribers typically receive at least ten channels of programming which cannot be received from over-the-air broadcast television. *Id.* at 548.

The growing importance of cable television is reflected in the significant growth in the number of cable subscribers over the past decade. Whereas in 1977 only 18 percent of all television households subscribed to cable service, by the end of 1987 more than 50 percent of all television households will subscribe to cable service. "Cable Stats," *Cablevision*, Sept. 28, 1987, at 64.

The average cable subscriber may subscribe to "basic cable service" for one monthly fee and one or more "pay" services for additional monthly fees. "Pay" services typically consist of single channels of programming featuring theatrical and made-for-cable movies and exclusive coverage of sporting events (e.g., Home Box Office). "Basic cable service," on the other hand, typically consists of a number of programming services provided to cable subscribers as a package including not only local over-the-air broadcast signals, but also a wide array of satellite-delivered programming services uniquely available over cable (e.g., Arts & Entertainment, Nickelodeon, MTV, the Discovery Channel, Cable News Network, WTBS-Atlanta), and PEG access channels. Basic cable service often includes more than 25 channels of video programming, and some cable systems offer basic cable service packages exceeding 70 channels. "Cable TV," *supra* at 552. In almost all cases, a pay service may be obtained only if the cable subscriber also takes basic cable service. *See Friedman v. Adams Russell Cable Services — New York, Inc.*, 624 F. Supp. 1195, 1196 (S.D.N.Y. 1986). Basic cable service is thus the gateway to the pay services for each cable subscriber.

(3)

Cable television has for many years been regulated at the federal, state and local levels of government. State and local governments have regulated cable television through the process of issuing franchises for a cable system's use of public rights-of-way. Because few cable systems face head-to-head competition for subscribers from other cable systems, franchising authorities have traditionally regulated basic cable service rates to prevent monopoly pricing.

In the mid-1970s, however, the FCC preempted rate regulation of pay channels even though it declined to regulate such rates itself. *Brookhaven Cable TV, Inc. v. Kelly,* 573 F.2d 765 (2d Cir. 1978), *cert. denied,* 441 U.S. 904 (1979). The FCC's preemption-and-deregulation initiatives in the area of cable television greatly accelerated in the early 1980s. In 1983, for example, the FCC attempted to deregulate portions of basic cable service by authorizing cable operators to remove all programming services, other than local broadcast signals and access channels, from the basic cable service tier notwithstanding the contractual requirements of their cable franchises and promises made to obtain those franchises. *Community Cable TV, Inc.,* 98 FCC 2d 1180 (1980). But see *Cox Cable New Orleans, Inc. v. City of New Orleans,* 594 F. Supp. 1452 (E.D. La. 1984) (holding that FCC policy did not excuse cable operators from compliance with franchise requirements governing basic cable service rates), vacated without opinion (E.D. La. Dec. 16, 1985).

(4)

Congressional concern about the FCC's accelerating preemption-and-deregulation initiatives in the area of cable television was a major factor in prompting Congress to pass the Cable Act, the first comprehensive federal legislation for cable television. As Congressman Markey, a principal cosponsor of the bill that became the Cable Act, observed:

> Everyone . . . should understand that if the House fails to pass a Federal cable policy, then our cities will be robbed of their control over cable TV. The era of deregulation, affirmed by the FCC and the Supreme Court, has hit cable regulation with a crippling force. . . . [W]e should be bold in our stance in support of the cities and the consumers. We should pass this compromise since it is good for consumers and fair to the cities and the cable industry.

130 Cong. Rec. H 10,444 (daily ed. Oct. 1, 1984).

The "compromise" Cable Act resulted from three years of negotiations among "the cities, the cable industry, and many others." 130 Cong. Rec. H 10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth, who had introduced the bill that became the Cable Act). The Cable Act was viewed by Congress as "a reasonable compromise which protects the interests of not only the cities and the cable industry, but those of the consumers of cable services as well." 130 Cong. Rec. S14,284 (daily ed. Oct. 11, 1984) (statement of Sen. Gorton).

The heart of the compromise was a clear delineation of regulatory authority at each level of government — federal, state and local. H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4661 ("House Report"). Congress expressly departed from the direction taken by the FCC immediately prior to the Cable Act by declaring "*continue[d] reliance on the local franchising process as the primary means of cable television regulation;* while defining and limiting the authority that a franchising authority may exercise through the franchise process." House Report at 19 (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4656. Simultaneously, Congress made clear that the FCC could no longer deregulate or preempt regulation of cable services pursuant to the broad powers that it had previously exercised under the general provisions of the Communications Act of 1934. *Compare United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) *with* 47 U.S.C. § 152(a) (Supp. 1987).

As compromise legislation, the Cable Act reflected a careful balance of a number of different and often conflicting considerations. No interest group — cable operators, franchising authorities, or consumers — obtained everything that it had sought through the legislative process. The Cable Act thus did not contemplate total deregulation, as is evident from two of its six stated purposes: to "establish franchise procedures and standards which encourage the growth and development of cable systems *and which assure that cable systems are responsive to the needs and interests of the local*

community" and to "promote competition in cable communications and minimize *unnecessary* regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §§ 521(2), (6) (emphasis added). To assure that cable systems are responsive to the needs and interests of the local community, the Cable Act both authorizes and requires continuing regulation of cable systems. For example, "a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3). Congress recognized that such regulation promoted First Amendment interests:

> [A]ccess to telecommunications networks has become increasingly important to full participation in the political, economic, social and cultural life of the nation. The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all of our citizens.

House Report at 36, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4673.

(5)

This case concerns Section 623 of the Act, 47 U.S.C. § 543, which establishes and delimits the power of franchising authorities to regulate cable rates. Section 623 permits franchising authorities to regulate the rates for "basic cable service" in those markets where the "cable system" does not face "effective competition." 47 U.S.C. § 543(b). The Act does not itself define "effective competition" but instead directs the Commission to adopt rules that will "define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. § 543(b)(2)(A). Congress clarified that directive in the House Report:

> In determining whether [a] cable system is subject to effective competition for the purpose of regulation of basic cable service, *the FCC should consider the number and nature of services provided, compared with the number and nature of services available from alternative sources and, if so, at what price.* In establishing the necessary regulations, the FCC should establish objective nationwide criteria which are readily applicable for determining on a community-by-community basis whether a cable system is subject to effective competition . . . . *The commission may find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market,* such as the penetration rate of the cable system.

House Report at 66, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4703 (emphasis added).

(6)

On December 11, 1984, the FCC released its *Notice of Proposed Rulemaking ("Notice")* to implement several provisions of the Cable Act, including § 623. 49 Fed. Reg. 48,765 (Dec. 14, 1984). Although Section 623 required it to define "effective competition" for a "cable system," the FCC proposed to define "effective competition" for "basic cable service" alone. *Notice* at ¶¶ 43 and 45.[1] The FCC, moreover, did not propose to define "effective competition" for "basic cable service" as the latter term was defined by the Cable Act, namely, any service tier that "includes" retransmission of local broadcast signals. 47 U.S.C. § 522(2). Nor did it propose to do so according to the economic reality that many cable systems include numerous nonbroadcast signals in their basic cable service package. Instead, the FCC observed:

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[1] "Basic cable service" is defined as "any service tier which includes the retransmission of local broadcast signals." 47 U.S.C. § 522(2). A "cable system" is defined in relevant part as "a facility consisting of a set of closed transmission paths and associated . . . equipment that is designed to provide cable service" but does not include systems only retransmitting broadcast signals. 47 U.S.C. § 522(6).

> In essence, basic cable service is the provision of locally viewed broadcast signals and required access channels. *While basic service can now contain additional programming (such as superstations or cable satellite networks) it need not, as a matter of definition.*

Notice at ¶ 43 (emphasis added). Having bypassed the statutory definition of basic cable service as well as the economic realities under which basic cable service is offered, the FCC proposed to define "effective competition" for basic cable service as the theoretical availability of four over-the-air broadcast signals. *Id.* It sought public comments on the proposed four-signal "effective competition" rule.

In comments and reply comments filed in response to the *Notice*, several state and local governments, citizen groups and other parties — including not only Petitioners here but also the Antitrust Division of the United States Department of Justice ("DOJ") — strongly opposed the FCC's proposal. They explained that the presence of a small number of broadcast signals in a community was not, by itself, sufficient to preclude cable operators from charging unreasonable rates for basic cable service. Relying upon antitrust market analysis, these parties, most notably DOJ, urged the FCC to recognize that its proposed definition of "effective competition" overlooked at least one source of any cable system's market power — the additional signals provided by a cable system within its basic cable service tier that are unavailable via over-the-air broadcast television.

By contrast, the cable industry commentors, including the National Cable Television Association ("NCTA") and the Community Antenna Television Association ("CATA"), urged the FCC to adopt an "effective competition" rule defined as two over-the-air broadcast television signals. In jointly filed comments, NCTA and CATA offered the results of a limited empirical study of 88 cable systems whose rates were either totally or partially deregulated. In reply comments, however,

several parties, including DOJ, pointed out a number of methodological flaws in the NCTA/CATA study that brought into question the reliability of its results.[2]

In its *Report and Order,* released on April 19, 1985, the FCC adopted a rule defining "effective competition" as the availability of three over-the-air broadcast signals. *Report and Order* at ¶ 99 (App. A45). It relied upon the NCTA/CATA study, noting that it "was cited by many as providing factual support for a standard based on fewer than three signals," *id.* at ¶ 97 (App. A43), without ever addressing the significant criticisms of that study. It also relied upon an internal staff study of certain cable subscriber viewing data and an empirical study of certain manufacturing industries, both of which were mentioned for the first time in the *Report and Order. Id.* at ¶ 99 (App. A45–46). The details of the internal staff study remained undisclosed until the FCC reluctantly released selective portions of that study pursuant to Freedom of Information Act requests. Even then, it continued to withhold critical details of the study's methodology, such as how various cable markets had been "randomly" chosen as samples. The results of the study, moreover, did not establish that cable systems had no ability to engage in monopoly pricing in a community in which three broadcast signals were theoretically available.[3] Likewise, the empirical study of certain

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[2] First, 41 percent of the cable systems sampled in the NCTA/CATA study were *not* randomly selected, thus creating a potential source of bias. Second, some unspecified number of sampled systems served multiple communities, at least one of which regulated basic cable service rates. For such cable systems, it was unclear whether the basic cable service rate was determined by market forces in one community or regulation by another community. These were but two of seven or eight significant questions raised concerning the NCTA/CATA methodology.

[3] The FCC staff purported to find that in communities having three or more over-the-air broadcast signals, cable subscribers spent more time watching those signals than other video programming services available over the cable. But the fact that basic cable service programming other than local broadcast signals only commands a particular viewing share in cable households is irrelevant to the pertinent question whether a cable operator

(continued)

manufacturing industries did not establish the absence of such market power in three signal communities.[4]

In its *Report and Order* the FCC refused to apply antitrust market analysis to the problem at hand. It dismissed DOJ's antitrust market analysis proposals, noting only that "several parties" had "state[d] that DOJ provides little justification other than supposition and intuition." *Id.* at ¶ 97.[5] In

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[3] *(continued)*
has market power. "Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing." H. Hovenkamp, *Economics and Federal Antitrust Law* 57 (1985). Even if cable households allot only 20 percent of viewing time to non-broadcast programming, those households may have such a strong preference for that programming that they will continue to subscribe to basic cable service despite drastic price increases.

[4] Kwoka, "The Effect of Market Share Distribution in Industry Performance," *Review of Economics & Statistics,* Vol. LXI, No. 1, Feb. 1979, pp. 101-09. According to the FCC, the Kwoka study "demonstrated that the presence of a third competitor of sizable market share may be sufficient to guarantee competition in a given industry." *Report and Order* at ¶ 99 (App. A45). However, Kwoka himself cautioned against generalizing his study results beyond the five manufacturing industries examined because these industries possessed special characteristics. Kwoka, *supra* at 107 n.15. Likewise, other commentators have noted that Kwoka's study is "more suggestive than definitive, because of the effects of price controls during part of the period under scrutiny." Posner & Easterbrook, *Antitrust: Cases, Economic Notes and Other Material* 42 (Supp. 1984).

[5] Although the comments of DOJ, petitioners and other parties relied on antitrust market analysis, the FCC never once mentioned that fact. Interestingly, on the very day that it released the *Report and Order,* the FCC released another document in an unrelated proceeding in which it stated that assessment of market power *requires* an antitrust market analysis. *Notice of Proposed Rulemaking, International Competitive Carrier Policies,* 100 FCC 2d 1270, 1275-82 (1985). In that *Notice of Proposed Rulemaking,* the FCC observed that "to determine the market power of a given firm, we must first define the relevant market." 100 F.C.C. 2d at 1275 (footnote omitted). Two products are deemed within the same product market if they are "functionally similar." *Id.* Pertinent factors include "substitutability in use." *Id.* "Cross-elasticity of demand can be used to determine substitutability in use [but] most cases have relied on practical indicia of this concept such as peculiar characteristics and uses and reasonable interchangeability. See *U.S. v. Brown Shoe Co.,* 370 U.S. 294 (1962)." *Id.* at 1275 n.15. By contrast, although the FCC in this case purported to assess cable operators' market power, it never even attempted to define the relevant product market for "basic cable service."

lieu of an antitrust market analysis to assess a cable system's market power, the FCC chose to "favor a presumption that competition does in fact exist rather than to assume that consumers will make no effort to seek out alternatives to basic cable service." *Id.* at ¶ 107 (App. at A50). This presumption apparently derived from the FCC's belief "that it was the intent of the Cable Act to significantly deregulate the provision of cable service." *Id.* at ¶ 100 n.69 (App. at A47).

Certain parties sought FCC reconsideration of aspects of the *Report and Order* unrelated to rate regulation. On May 30, 1986, the FCC issued its *Memorandum Opinion and Order* denying the petitions for reconsideration.

(7)

After reviewing the circumstances leading to enactment of the Cable Act, the Court of Appeals observed that the Act reflected a balance of competing considerations:

> In establishing regulatory guidelines, Congress was concerned *both* with relieving the cable industry from unnecessary, burdensome regulation *and* with ensuring that cable systems remain responsive to the needs of the public. *See* § 601(2), (4), (6), 47 U.S.C. § 521(2), (4), (6). Our task in this case is to decide whether the rules adopted by the FCC have impermissibly altered the balance struck by Congress.

(App. A131–32). Although the FCC's "effective competition" rule deregulated basic cable service rates in most communities in the United States — a fact not mentioned in the Court of Appeals' opinion — the Court of Appeals found that the rule did not impermissibly alter the balance struck by Congress in the Cable Act. The Court of Appeals also observed that Section 623 required the FCC to " 'define the circumstances' in which a cable system is not subject to 'effective competition.' " (App. A132). But it did not explain why the FCC could define "effective competition" for "basic cable

service" alone. Crucially, the Court of Appeals held that the FCC could not depart from the precise statutory definition of "basic cable service." 47 U.S.C. § 522(2). (App. A155). Indeed, the Court found error in the FCC's deviation from that definition with regard to the agency's determination of which tiers of service are subject to regulation. (App. A155). But, curiously, the Court overlooked the FCC's departure from this definition with regard to its determination of a standard for "effective competition."

The Court of Appeals noted that the three-signal "effective competition" rule had been adopted by the FCC "[b]ased on the comments submitted by the various parties, an internal staff study and materials drawn from the economic literature. . . ." (App. A135). With a few exceptions not relevant here, it held that: "the FCC addressed the significant comments made in the rulemaking proceeding, articulated the basis for its conclusion, and adopted rules that are at a minimum 'reasonable.' " (App. A143). The Court, however, never explained why the comments by DOJ and others proposing an antitrust market analysis and criticizing the NCTA/CATA study were so insignificant they need not be addressed at all by the FCC. Nor did the Court of Appeals explain why the rule was reasonable despite the FCC's reliance on two irrelevant studies, neither of which had even been mentioned in the *Notice* and one of which remained largely undisclosed.[6]

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[6] Having upheld the FCC's "effective competition" rule, the Court of Appeals remarked that the FCC's "predictive judgment" was "based on the evidence it had accumulated in the relatively short time frame within which Congress directed the agency to complete its rulemaking." (App. A144). In fact, although the FCC was required to fashion its rule within 180 days after enactment of the Cable Act, the FCC had an additional 15 months to revisit its rule while it deliberated on various petitions for reconsideration. (App. A96). The Court of Appeals further observed that given "the tentative nature of its predictive judgment," the FCC must "vigilantly monitor the consequences of its rate regulation rules." (App. A145). To date, more than two years after the three-signal rule was adopted, the FCC has yet to open a formal proceeding to review the effects of that rule.

REASONS FOR GRANTING THE WRIT

THE FCC COMMITTED PROCEDURAL AND SUBSTANTIVE ERRORS THAT WILL HAVE PERVASIVE NATIONWIDE IMPACT, WILL PREEMPT STATE AND LOCAL GOVERNMENTS OF TRADITIONAL CABLE RATE REGULATION POWERS, AND WILL EXPOSE CABLE SUBSCRIBERS TO MONOPOLY PRICING.

Petitioners submit that in several ways the FCC's process of and end result in defining the standard of "effective competition" departed significantly from the proper approach to implementation of the Cable Act. But this case is not merely one in which the agency and the court below committed procedural and substantive errors. Rather, it is one in which procedural and substantive errors will have sweeping nationwide impact, will preempt state and local governments in an area in which they have traditionally exercised authority, and will subject cable subscribers to the hazards of a market that is effectively competitive only according to the FCC. It is in this context that this Court should consider plenary review of the errors described below.

1. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Requires Agencies To Construe Statutes In Accordance With The Unambiguously Expressed Intent Of Congress.

This Court has recently clarified the judicial role in reviewing the construction of a statute by an agency charged with its enforcement:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the

> matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (footnote omitted). "The starting point of analysis is the language of the statute itself." *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 508 (1981), citing *Steadman v. SEC*, 450 U.S. 91, 97 (1981) and *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In the present case, however, the Court of Appeals — without acknowledging this doctrine — sanctioned the FCC's two-fold deviation from unambiguous statutory language. First, the FCC, instead of defining "effective competition" for a "cable system," as required by Section 623 of the Cable Act, defined "effective competition" for "basic cable service" alone. Second, and perhaps more significantly, the FCC did not even pause to use the statutory definition of the "basic cable service" standard upon which it erroneously relied. From the outset, the FCC defined "basic cable service" solely in terms of broadcast signals. It thus excluded all non-broadcast programming (except access channels) from "basic cable service." The Cable Act, however, defines "basic cable service" to mean "any service tier which *includes* . . . broadcast signals." 47 U.S.C. § 522(2) (emphasis added). According to this statutory definition, "basic cable service" is not limited to broadcast signals but includes non-broadcast programming. In effect, the FCC simply chose to administratively rewrite the statutory definition of "basic cable service" so as to include the limiting phrase "but excludes non-broadcast programming."[7]

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[7] Given that the Court of Appeals found the FCC to have erred by not following the statutory definition of "basic cable service" in determining which tiers of service are subject to regulation, the Court's failure to find a similar erroneous deviation from the statutory definition in determining a standard for "effective competition" is especially puzzling.

While Congress expressly delegated the task of defining "effective competition" to the FCC, it precisely instructed the FCC to "consider the number and nature of [cable] services provided, compared with the number and nature of services available from alternative sources and, if so, at what price." House Report at 66, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4703. The Court of Appeals nevertheless deemed that instruction to be virtually nullified by subsequent language in the House Report stating that the FCC "*may* find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market . . . ." *Id.* (emphasis added). But the subsequent statement and earlier instruction are reconcilable: together, they mean that the FCC should consider the number and nature of cable services provided, compared with what is available from alternative sources and, having done so, may find it relevant, i.e., necessary, to fashion an "effective competition" rule based on factors in addition to the number of available broadcast signals.[8]

If there were any doubt that the three-signal "effective competition" rule was contrary to unambiguous Congressional intent, that doubt is removed by the fact that Congress specifically rejected a statutory definition of "effective competition" based on four broadcast signals contained in the cable bill initially passed by the Senate and later replaced by the bill that became the Cable Act.[9] " 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1219 (1987), quoting *Nachman Corp.*

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[8] Indeed, it seems almost dispositive of the question whether the FCC could disregard the non-broadcast component of cable service to observe that a system that only retransmits broadcast signals is not even a "cable system" under the Cable Act. 47 U.S.C. § 522(6).

[9] S. 66, 98th Cong., 1st Sess. § 607 (1983). *See* 129 Cong. Rec. § 8326 (daily ed. June 14, 1983), S. Rep. No. 67, 98th Cong. 1st Sess. 22-23 (1983)).

v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting). Congressional rejection of the proposed four broadcast signal definition provides strong evidence that Congress did not intend to authorize promulgation of a three broadcast signal rule either.

2. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Requires Agencies To Consider All Relevant Factors And Explain Departures From Longstanding Policies.

Administrative agencies must consider all relevant factors in fashioning their rules. *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983); *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Failure to consider a relevant factor is arbitrary and capricious. Likewise, administrative agencies must provide a reasoned analysis when they depart from longstanding policies, and failure to do so is arbitrary and capricious. *Motor Vehicle Manufacturers Association of United States, Inc.*, 463 U.S. at 57. The Court of Appeals ignored both principles in upholding the FCC's three broadcast signal rule.

Antitrust principles were surely a relevant factor for the FCC to consider in assessing the market power of cable systems. *Direct Marketing Association, Inc. v. United States Postal Service*, 778 F.2d 96, 105 (2d Cir. 1985); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 959 (D.C. Cir. 1968). Although various parties suggested that the FCC apply antitrust market analysis to the "effective competition" issue, the FCC completely ignored those suggestions. The FCC went so far as to dismiss, as based upon "supposition and intuition," the analysis of DOJ, the agency recognized as having greatest expertise at the federal level in evaluating competition in telecommunications markets. The FCC's failure in this regard was especially arbitrary because the FCC has

traditionally applied antitrust market analysis to assess the degree of competition in telecommunications markets. *See, e.g., Fourth Report and Order, Policy and Rules Concerning rates for Competitive Common Carrier Services and Facilities Authorization Therefor,* 95 FCC 2d 554, 557–82 (1983); *Notice of Proposed Rulemaking, International Competitive Carrier Policies,* 100 FCC 2d 1270, 1275–82 (1985); *Notice of Proposed Rulemaking, Decreased Regulation of Certain Basic Telecommunications Services,* 2 FCC Rcd 645, 647 (1987). The FCC thus also acted arbitrarily by failing to provide any explanation, let alone a reasoned one, for its departure from its traditional mode of analysis.

Rather than undertake a principled analysis of the effective competition question, the FCC relied on a presumption of competition. This presumption apparently derived from its erroneous view of the Cable Act as a deregulatory manifesto — a view that disregarded other important goals of the Cable Act, including "maximizing the availability of cable services. . . ." *Housatonic Cable Vision v. Dept. of Public Utility,* 622 F. Supp. 798, 811 (D.C. Conn. 1985). As with antitrust market analysis, the FCC treated this important statutory goal as simply another irrelevant factor.[10]

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[10] Interestingly, the FCC, in selectively quoting from the section of the Cable Act defining the Act's purposes, observed that:

> "Foremost among these [purposes] is the intent of the statute to establish 'standards which encourage the growth and development of cable systems *** assure that cable communications provide *** the widest possible diversity of information sources and services to the public' and 'promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.' We believe that we must implement Section 623(b) consistent with these statutory goals." *Report and Order* at ¶ 116. (deletions in original) (App. at A55–56).

Apparently because of the seeming conflict with its deregulatory mindset, the FCC deleted mention of the goal of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).

3. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Prohibits An Agency From Relying On Studies Which Are Irrelevant, Undisclosed, Or Lacking Statistical Validity.

" 'It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [in] critical degree, *is known only to the agency.*' " *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (emphasis in original), *quoting Portland Cement Association v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986). Nor may an agency rely upon a study that has been criticized in public comments as being statistically unreliable, without at least addressing the statistical criticisms. *St. James Hospital v. Heckler*, 760 F.2d 1460, 1469 (7th Cir.), *cert. denied*, 106 S.Ct. 229 (1985). Likewise, an agency may not rely upon a study to support findings unrelated to the study's results. *Bowen v. American Hospital Association*, 106 S.Ct. 2101, 2115 & n.18 (1986) (Stevens, J., plurality); *St. James Hospital v. Heckler*, 760 F.2d at 1468; *Almay v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1978).

The Court of Appeals entirely ignored the FCC's violation of all three of these principles. First, the FCC relied upon the NCTA/CATA study without ever addressing the significant criticisms of that study. Second, it relied upon an internal study virtually unavailable for public comment. Third, it relied on two studies, its internal study and the Kwoka study, which were plainly irrelevant to the pertinent question whether cable systems possess market power. Had these violations not occurred, the result of the rule-making process may have been very different, and state and local governments throughout the country may have retained their traditional authority to safeguard cable subscribers against the possibility of monopolistic cable rate pricing.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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Supreme Court, U.S.
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CLERK

87-671

No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CONNECTICUT, CITY OF NEW YORK, NATIONAL LEAGUE OF CITIES, and AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS
TO THE JOINT APPENDIX

Orders and Opinions Below PAGE

Report and Order in MM Docket No. 84-1296, 50 Fed. Reg. 18,637 (1985) (released April 19, 1985)..... 1

Memorandum Opinion and Order in MM Docket No. 84-1296, 51 Fed. Reg. 21,770 (1986) (released June 5, 1986)..... 96

Opinion of the United States Court of Appeals for the District of Columbia Circuit, decided July 17, 1987, in *American Civil Liberties Union v. FCC*, 824 F.2d 1554 (D.C. Cir. 1987)..... 115

Relevant Statute

Cable Communications Policy Act of 1984 (relevant portions)..... 186

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MM Docket No. 84-1296

MM—FCC 85-179—35670

In the Matter of

Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1985 Released: April 19, 1985

By the Commission:

Commissioner Rivera not participating.

INTRODUCTION

1. By this action, the Commission amends its rules to implement certain provisions of the Cable Communications Policy Act of 1984. This action establishes rules and regulations for cable systems in the areas of ownership, channel usage, franchise requirements and pole attachments. In addition, it establishes regulations and guidelines governing the regulation of basic cable service rates by franchising authorities.

BACKGROUND

2. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act) was signed into law.[1] This legislation amends the Communications Act of 1934, as amended, by adding a new Title VI, entitled "Cable Communications."[2] The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve.[3]

3. On December 4, 1984, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) in the above-captioned proceeding.[4] In this *Notice*, the Commission proposed to amend its rules to implement certain provisions of the Cable Act.[5] In particular, the *Notice* proposed, *inter alia*: 1) definitions for the terms cable operator, cable service, and cable system; 2) procedures whereby an aggrieved party may petition the Commission for a ruling or file a complaint concerning commercial channel access; 3) rule changes regarding common carrier ownership of cable systems in their rural service areas; 4) criteria for determining whether a cable system is subject to effective competition; 5) standards for regulation of basic

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1 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 1 *et seq.*, 98 Stat. 2779 (1984).

2 The Cable Act also amends certain other provisions of the Communications Act of 1934, as amended. For example, the Cable Act also amends Section 224(c) of the Communications Act of 1934, as amended, by adding a new paragraph (c)(3).

3 *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (hereinafter House Report).

4 *See Notice of Proposed Rule Making* in MM Docket No. 84-1296, 49 FR 48765 (1984).

5 The Commission also recently initiated a separate rule making proceeding regarding the equal employment opportunity provisions of the Cable Act. *See Notice of Proposed Rule Making*, MM Docket No. 85-61, FCC 85-102, adopted March 1, 1985.

cable service rates by a franchising authority in those instances where a cable system is not subject to effective competition; and 6) modification of our rules concerning state regulation of pole attachments to reflect new language contained in the Cable Act.

4. One hundred and forty (140) parties filed comments and sixty-three (63) parties filed replies in response to the *Notice*. A list of all parties is contained in Appendix A. The Commission was required by the Cable Act to complete this rule making within 180 days of enactment.

DISCUSSION

Section 602—Definitions

5. Section 602 of the Cable Act defines a number of fundamental terms. In the *Notice*, we proposed to amend our rules to adopt the definitions of cable operator, cable service, and cable system contained in the Cable Act. In proposing these changes, we noted that there are differences between the new definitions and the definitions presently in our rules and that these differences may affect the manner in which we currently regulate certain segments of the cable industry. Comments were sought on the proposed definitions of these terms. Each of these terms is discussed below.

6. *Cable Operator*. The term "cable operator" is defined in paragraph (4) of Section 602 of the Cable Act as follows:

> . . . any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

The term "affiliate" when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with,

such person.[6] A "significant interest" for the purposes of this definition means a cognizable interest as provided in the Commission's rules for attributing interests in broadcast, cable television and newspaper properties.[7]

7. Several parties submitted comments on the proposed cable operator definition. Comments filed by the law firm of Hogan & Hartson on behalf of various cable operators and state cable associations (Hogan & Hartson) state that the proposed definition, if read broadly, could include not only the local entity providing cable service to the community but also entities associated with the cable entity. This could include companies with management contracts to run the cable system, even if those companies have no ownership interests, and any person with a "cognizable interest" in the cable system, even if those persons do not participate in the management of the system. Hogan & Hartson suggests that the Commission "should clarify the definition by limiting it to a single cable operator per cable system." Tele-Communications, Inc. (TCI) believes that the Commission should clarify the use of the term "affiliate" to indicate that it is not being used in its common communications sense but rather is used to describe a purely legal relationship. In this regard, TCI believes that the Commission's present rules are more reflective of congressional intent.

8. The New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX), while supporting the Commission's proposal, believes that more specificity is needed. NYNEX is concerned that the definition may give rise to uncertainty concerning the ability of the telephone companies to construct, sell or lease a cable system. NYNEX requests that the definition be amended to specify that "controls or is responsible for" pertains to provision of cable services, not

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6 *See* Section 602(1) of the Cable Act.

7 *See* 47 CFR §§ 73.3555, 73.3615 and 76.501. *See also* House Report at 41.

facilities. Similar views are expressed by Pacific Bell and Nevada Bell (Pacific) in its comments and by the Ameritech Operating Companies (Ameritech) in its reply comments. Both Pacific and Ameritech propose that language be added to the proposed definition to affect this change.[8] BellSouth Corporation (BellSouth), on behalf of its operating telephone companies, supports the Commission's proposed adoption of the language contained in Section 602(4) of the Cable Act. Similarly, Southwestern Bell Telephone Company (Southwestern Bell) supports the definition but suggests the Commission add language to clarify the meaning of "significant interest." The Communications Workers of America (CWA), in its comments, suggests that the definition be amended to include either "cable television system operator or cable operator" to ensure consistency with the statute.

9. After review of the comments and replies, we believe that our original proposal is generally appropriate. However, in order to ensure completeness and consistency with the statute, we will also amend our rules to include definitions of the terms: affiliate; person; and significant interest. With regard to limiting the definition to include only a single cable operator per cable system, we feel that the definition of a cable operator is intentionally broad and that a cable system may have more than one operator. According to the definition, any person who "provides cable service" and "owns a significant interest" in a cable system either directly or through a subsidiary or affiliated company would be a cable operator. In addition, anyone who controls or is responsible for the "management and operation" of a cable system would also come under the definition of a cable operator and may also be subject to

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8 Pacific proposes that the definition be amended to state that it "does not include a person or group of persons who provides cable distribution facilities for channel service to cable systems." Ameritech proposes the adoption of the language suggested by Pacific or the following language:

> This definition shall not include a person or groups of persons who lease or manage local distribution systems for the delivery of cable services by third parties.

sanctions for violations of the provisions of the Cable Act.[9] On the other hand, mere ownership of facilities used by a cable system would not be sufficient to qualify an entity as a cable operator. Accordingly, telephone companies that merely construct or lease cable system facilities are not cable operators under the Cable Act.

10. *Cable Service*. Section 602(5) of the Cable Act defines the term "cable service" as follows:

> (A) The one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

The Commission's rules do not contain a definition of cable service or the terms "video programming" or "other programming service" which are included in this definition.[10] In the *Notice*, we proposed to include only the definition of the term cable service in our rules.

11. Most parties commenting on this matter favor the addition of the definition of cable service to the Commission's rules.[11] Several parties, however, comment that the proposed

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9 However, we will generally proceed against the franchisee who is a matter of record with us.

10 The terms "video programming" and "other programming service" are defined in Sections 602(11) and 602(16), respectively, of the Cable Act as follows:

> the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station;
>
> the term "other programming service" means information that a cable operator makes available to all subscribers generally.

11 These parties include Ameritech, Anchorage Telephone Utility, BellSouth, CWA, the City of New York (NYC), the Department of Justice (DOJ), GTE Services Corp. (GTE), the National Telecommunications and Information Administration (NTIA), NYNEX, Pacific, Southwestern Bell and the Connecticut Department of Public Utility Control (Connecticut PUC).

definition of cable service is incomplete and potentially confusing without also defining the terms "video programming" and "other program services" contained in the Cable Act. A number of parties suggest that the definition of cable service is meant to delineate the boundary between such services and services for which common carrier regulation could potentially be imposed.[12] In this regard, Southwestern Bell suggests a more precise definition of cable service in order to differentiate more clearly between cable services and telephone common carrier services. Several telephone interests, such as BellSouth and GTE, believe that our rules should state that the provision of non-video programming by a telephone company is a permissible activity under the Cable Act.

12. DOJ requests that the Commission clarify the definition of the term video programming contained in the Cable Act. DOJ recommends that the Commission indicate that programming "comparable" to that provided by a television broadcast station includes satellite-delivered, advertiser-supported programming networks such as ESPN, commercial-free TV programming such as HBO, and pay-per-view services which are not generally provided by broadcast television stations.

13. The National Cable Television Association, Inc. and the Community Antenna Television Association (NCTA/CATA), on the other hand, suggest that the Commission need not define the term cable service in the rules, because the term does not generally appear elsewhere in the Commission's rules and inclusion of the term is inappropriate given the unresolved

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12 For example, Anchorage Telephone Utility states in its reply comments that Congress included the definition of cable service "to differentiate between cable services exempted from common carrier regulation and all other non-cable communications services which can be provided over a cable system. Anchorage also states that Congress intended that cable operators should not be allowed to function as telecommunications common carriers. Similarly, Southwestern Bell proposes that the Commission adopt Sections 3(b) and 621(d)(2) of the Cable Act concerning jurisdiction of the FCC and the states with respect to cable service to ensure clear delineation between the regulatory treatment of cable operators offering cable services and those offering common carrier services.

preemption issues related to two-way services provided by cable systems. NCTA/CATA maintains that such inclusion might suggest that the Commission had decided that any services "other than those meeting the Cable Act's definition of 'cable service' could be regulated as common carrier services . . . ." In its reply comments, NCTA/CATA states that the term cable service is intended to distinguish between those services "that cannot, by statute, be regulated on a common carrier basis from those whose regulatory status is yet to be determined by the Commission." Inclusion of the definition, it states, could be viewed as resolving the issue of preemption of state regulation of two-way services provided by cable systems.

14. We stated in the *Notice* that the legislative history indicated that the intent of Congress in defining cable service is to mark the boundary between the cable services that the legislation specifically exempts from common carrier regulation under Section 621(c) of the Cable Act and all other non-cable communications services which cable systems could provide. We proposed to resolve only those issues raised in the Cable Act and, therefore, not to address the issue of the regulatory treatment of non-cable communications services offered over cable systems.[13] Consistent with our proposal, therefore, we will avoid ruling at this time on the manner of regulatory treatment of non-cable services. We emphasize that our adoption of the term "cable service" in our rules in no way represents any decision as to the regulatory treatment of non-cable services.

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13 This issue is currently under consideration before the Commission in Cox Cable Communications, Inc. (CCB-DFD-83-1), which concerns preemption of state regulation of Cox's institutional cable service in Omaha, Nebraska. The House Report states that the Committee "does not intend to resolve or even address the issue of the state or Federal treatment of non-cable communications services offered over cable systems . . . ." *See* House Report at 60. It also states that nothing in the Cable Act "shall be construed to affect existing regulatory authority with respect to non-cable communications services provided over a cable system." *See* House Report at 41.

15. We believe that inclusion of the term "cable service" in our rules is necessary and consistent with the intent of Congress. The term issued extensively not only throughout the Cable Act but also in the rules we are adopting today. We believe that adoption of the term precisely as stated in the Cable Act is a necessary part of our implementation process. We believe that the legislative history and intent provides sufficient guidance regarding the definition of cable service. Such service includes programming services that make non-video information generally available to all subscribers and do not include subscriber-specific information. Cable services include, for example, pay-per-view video programming, teletext, one-way transmission of computer software, and on-line airline guides or catalog services that do not allow direct customer purchases. Two-way services that allow subscribers to manipulate or otherwise electronically process information or data would not be classified as cable services.[14] Examples of such non-cable services include at-home shopping and banking services, data processing, video conferencing, and all voice communications.[15]

16. We are also amending our rules at this time to include definitions of the terms "video programming" and "other programming service" as they are stated in the Cable Act. These terms are contained within the definition of the term "cable service" and we believe that their incorporation in the rules will reduce potential confusion which may arise from their absence. Further, with respect to the definition of video programming, we conclude that this definition is sufficiently expansive to include such video programming as that provided by ESPN, HBO, and other satellite-delivered cable network programming.

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14 With respect to data processing services or use of data bases, we believe that the distinction between cable and non-cable services occurs with regard to where the data processing takes place. For example, downloading of data to a home computer that then is used to manipulate or process the information would still be considered a cable service.

15 *See* House Report at 41-44.

17. *Cable System.* The *Notice* also solicited comment on the definition of the term "cable system" contained in the Cable Act. The Cable Act defines a cable system as:

> . . . a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . .[16]

Furthermore, the definition of cable system in the Cable Act specifically excludes *inter alia*: 1) facilities that only retransmit the signals of television broadcast stations; and 2) facilities that serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facilities use public rights-of-way.

18. In the *Notice*, the Commission recognized several differences between this definition and the existing definition of a cable system in the Commission's rules. For example, the Commission's rules define a cable system as a facility that distributes the signals of broadcast stations.[17] The Cable Act redefines a cable system as a facility that provides video programming and it specifically excludes facilities that only retransmit broadcast signals.[18] In this regard, we requested comment on whether or not to include satellite-received "superstations" within the meaning of television broadcast signals; our initial position was that such facilities not be included within the meaning of television broadcast signals for this purpose.

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16 Section 602(6) of the Cable Act.

17 The existing definition of a cable system is contained in Section 76.5(a) of the Commission's rules. 47 CFR § 76.5(a).

18 The staff estimates that about ten to twelve percent of all cable facilities, serving less than two percent of all subscribers, carry only broadcast signals.

19. A second difference is that cable systems with fewer than 50 subscribers are presently exempted from our rules. Under the Cable Act, such systems are no longer exempted. A third difference is that the Cable Act includes facilities, such as satellite master antenna television (SMATV) systems, that serve subscribers in one or more multiple unit dwellings under common ownership, control or management, if such facilities use public rights-of-way. The Commission's rules exclude all facilities that serve multiple unit dwellings under common ownership, control or management.

20. In proposing to adopt the definition of a cable system contained in the Cable Act, we noted that a number of regulatory concerns remain for facilities which previously qualified as cable systems but would no longer come under the definition and sought comment on what, if any, other principles should be applied to such facilities. We indicated that existing federal preemption policies such as those relating to franchise fee limits, technical standards, mandatory signal carriage, sports blackout, and network nonduplication rules would no longer be applicable to these systems. In addition, such facilities would no longer be eligible to be licensees in the Cable Television Relay Service (CARS). We raised the question of whether existing licensees should be "grandfathered" or whether the CARS eligibility rules should be amended.

21. In general, most commenters support adoption of the proposed definition of a cable system contained in the Cable Act. Some concern, however, was raised by a number of broadcast interests and others about the impact the Cable Act definition of a cable system may have on the Commission's signal carriage rules.[19] For example, the National Broadcasting Company, Inc. (NBC) and the Corporation for Public Broadcasting (CPB) argue that the definition of a cable system should not exempt cable facilities that retransmit exclusively broadcast signals. CPB indicates that at a minimum if the

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19 The carriage rules cited by the commenters include sports blackout, technical standards, network nonduplication protection and the mandatory carriage or must-carry rules.

Commission adopts the Cable Act definition it must amend its signal carriage rules to include facilities that retransmit exclusively broadcast signals. Similarly, the Association of Independent Television Stations, Inc. (INTV), in its reply comments, states that the Commission should retain its current definition of a cable system at least for the purposes of its "must-carry" rules. Other parties, such as NCTA/CATA, also indicate that the Commission should conduct a further inquiry to determine the extent to which systems not covered by the Cable Act or the rules should be subject to signal carriage rules, technical requirements and other regulations similar to those applied to cable systems.

22. DOJ, in its comments, states that the Commission's must-carry rules would not, as a practical matter, need to be applied to "classic" cable systems (*i.e.*, systems that retransmit only broadcast signals) since these systems will generally respond to demand for retransmission of those signals desired by consumers. In its reply comments, DOJ indicates that the Commission does retain authority over these systems and suggests that the Commission could seek further comment on whether such systems should remain subject to the "array of signal carriage regulations" historically applied to cable television systems.

23. With regard to the retransmission of "superstations," the majority of commenters on this issue support the Commission's proposal in this matter.[20] They believe that satellite-received superstations should not be included within the meaning of television broadcast signals contained in the exception to the definition of a cable television system. The commenters generally agree that such television broadcast signals be limited to only those signals received in a conventional manner. In this regard, DOJ states that the Commission has discretion in this matter but suggests that a reasonable way to deal with this problem is to include such systems as cable systems.

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20 *See, e.g.*, comments of Pennsylvania Cable Television Association (PCTA), NYC, and DOJ.

24. Most commenters object to our proposal to include SMATV systems serving multiple unit dwellings not under common ownership, control or management as cable systems only if they use public rights-of-way. Some SMATV, cable and municipal interests submit that the Cable Act is not intended to alter the present status of non-commonly owned multiple unit dwellings. Austin Satellite Television, Inc. *et al.*, for example, states that the Commission proposal to include such facilities in the exemption would require "otherwise legitimate cable systems" to utilize public rights-of-way in order to be considered cable systems. The City of St. Louis, NYC, the Municipal Coalition and the National League of Cities (NLC) agree and state that the Cable Act imposes new regulations on SMATVs that use public rights-of-way and serve commonly owned, controlled or managed multiple unit dwellings.

25. Another issue which some commenters address is the interpretation of the phrase "use of public rights-of-way." Private Cable Systems, Inc. and Direct Satellite Communications, Inc. suggest that the definition of the term should remain a local responsibility and that the revised definition should not automatically subject SMATV systems to federal cable regulation.[21] In its reply, NTIA, on the other hand, declares that Congress did intend to include systems which make incidental use of public rights-of-way in the cable system definition. Furthermore, NCTA/CATA, TCI, the National Association of State Cable Agencies (NASCA), and the City of Austin state that, regardless of their status under the Cable Act, SMATVs should be subject to the same regulatory obligations as cable systems.

26. Several commenters were concerned with the impact of the definition on small cable systems and SMATV operations. The Microwave Communications Products Division of the Hughes Aircraft Company (Hughes) states that this new defini-

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21 Direct Satellite notes, for example, that it is not unusual for a commonly-owned group of multi-unit dwellings to be situated on both sides of a public street or for a developer to dedicate streets to a local municipality following construction.

tion will render many older and smaller cable systems ineligible for CARS licenses. Hughes believes that such systems should continue to be eligible for CARS licenses. Hughes does not believe that grandfathering these existing small systems is the appropriate solution. Hughes proposes that the CARS eligibility rules be amended to incorporate the existing Commission definition of "cable system."

27. After reviewing the record, we believe that adoption of the definition of a cable system contained in the Cable Act is appropriate. We concur with DOJ, which states in its comments, that the Commission cannot define cable systems to include systems that retransmit only broadcast signals given the clear language to the contrary in the Cable Act. Accordingly, facilities that merely retransmit broadcast signals will not be considered cable systems for purposes of the Cable Act or the Commission's rules to the extent indicated herein. With respect to the status of "superstations," we believe that such signals which emanate well beyond the local viewing area should not be considered broadcast television signals for the limited purpose of the broadcast-only exclusion contained in the definition of a cable system. To do otherwise would preclude from regulation many systems which the Congress clearly intended to include within the scope of the Cable Act's definition of a cable system. On the other hand, we agree with the commenters that this proceeding is not the appropriate place to decide the status of signal carriage requirements for such rebroadcast only facilities. Accordingly, at this time, facilities now subject to signal carriage rules will continue to remain subject to those same requirements. Facilities constructed after the effective date of these rules and not meeting the definition of a cable system contained in the Cable Act, however, will no longer be subject to any signal carriage requirements. With regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way. Further, with respect to CARS eligibility, we believe that CARS facilities should be limited to only those systems which qualify as cable systems under the revised

definition.[22] We will, however, grandfather existing systems which hold CARS licenses as of the effective date of this action. As a final matter, we emphasize that any regulations which are inconsistent with the policy of the statute or place a burden on interstate communications will continue to be regarded as in conflict with federal regulatory policy.[23]

Sections 611 and 612—Use of Cable Channels

28. Sections 611 and 612 of the Cable Act concern the use of cable channels. Section 611 specifies that a franchising authority may establish requirements to designate channels for public, educational or governmental (PEG) use. In addition, Section 611 prohibits the cable operator from exercising any editorial control over the PEG channels. Section 612 establishes those conditions under which a cable operator must designate channels for commercial use by persons unaffiliated with the cable operator. The term "commercial use" is defined in Section 612(b)(5)(B) as the provision of video programming, whether or not for profit. Cable systems with fewer than 36 activated channels are not required to designate any channel capacity for commercial use. Cable systems with 36 or more activated channels must designate a certain percentage of their capacity for commercial use.[24]

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22 It should be noted, however, that such cable facilities may be eligible for microwave systems above 18 GHz in the private radio services and can also lease channel capacity from common carriers.

23 *See*, for example, *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *recon. denied* FCC 84-206 (May 14, 1984), *aff'd sub nom. New York State Commission Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

24 Systems with 36 to 54 activated channels must designate 10 percent for commercial use and systems with 55 or more must designate 15 percent. Except for systems with more than 100 channels, must-carry channels and channels which cannot be used due to technical and safety requirements (*e.g.*, aeronautical channels) are subtracted from the system's total capacity for the purposes of determining the percentage of designated commercial channels. In addition, any fractional amount of a channel is rounded up to the next whole number of channels.

29. Section 612 also provides a right of action for any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available. The first avenue of relief is the federal court system. However, Section 612 also provides that parties may petition the Commission for relief upon a showing that a cable operator or a multiple system operator (MSO) has repeatedly violated this section.[25] The Commission is also authorized to establish any additional rule or order, including a rate schedule, if it finds that there is a pattern or practice of abuse.

30. *Commercial Channel Access Disputes.* In order to implement the provision of the Cable Act concerning commercial channel access disputes, we proposed in the *Notice* to follow the administrative procedures set forth in Section 76.7 of the Commission's rules. Section 76.7 provides procedures for petitions for special relief whereby an aggrieved party may petition the Commission for a ruling or file a complaint. We requested comment on this approach as well as other remedial procedures such as the show cause procedures contained in Section 76.9 of the Commission's rules.

31. Most parties commenting on this matter favor the use of the special relief procedures proposed in the *Notice*. For example, cable parties and other interests generally endorse the use of the special relief procedures contained in Section 76.7 of our rules for adjudication of commercial channel access disputes. Several commenters suggest, however, that specific language be added to the proposed rule to indicate that three prior adjudications are required before the special relief procedures may be invoked.

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25 Three or more adjudicated violations would generally constitute a pattern or practice of abuse with respect to a single cable operator. However, three adjudications on three different cable systems all controlled by an MSO may not necessarily constitute such a pattern. Nevertheless, to the extent that a few violations which might otherwise appear to be isolated are found to be the result of corporate headquarter decisions, directives or actions, these actions may be grounds for a Commission finding that an MSO has engaged in a pattern of abuse. *See* House Report at 53-54.

32. The Cable Television Access Coalition (Access Coalition) and Connecticut PUC contend that the burden of proof in these matters should be on the cable operator and not the petitioner. For this reason, they propose that a show cause procedure be used. NYC, in its comments, suggests that an aggrieved party should be able to choose any course of action, *e.g.*, special relief, show cause or forfeiture proceeding.

33. Some commenters express concern over what constitutes commercial leased access in terms of rate discrimination. The Access Coalition claims the "Commission should emphasize that rate structures . . . must fall within a reasonable scope . . . ."

34. After reviewing the comments and replies, we conclude that the administrative procedures proposed in the *Notice* are the most appropriate means of adjudicating commercial channel access disputes. The special relief procedures afford the Commission significant flexibility in conducting a proceeding and in determining an appropriate remedy. While such special relief procedures do place the burden of proof on the petitioner, we believe that this burden is not unreasonable and is consistent with the prior adjudication standard set forth in the Cable Act.[26] Therefore, we are amending our rules to include a new rule section on commercial channel access as proposed in the *Notice*. This new rule section will specify that the special relief provisions contained in Section 76.7 shall be used in the case of commercial channel access disputes. We will also specify in this rule section that three prior adjudications are necessary before the Commission will entertain petitions regarding commercial channel access. This action in no way limits the sanction provisions, such as show cause orders and forfeitures, which the Commission may take in response to commercial channel access disputes.

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26 There must be three or more adjudicated violations before an aggrieved party may petition the Commission. Furthermore, the special relief process may also protect MSOs from frivolous complaints of violating this section.

35. With respect to the issue of establishing rules to ensure reasonable rates for commercial leased access, Section 612(f) of the Cable Act states that "there shall be a presumption that the price, terms, and conditions for use of [commercial] channel capacity . . . are reasonable and in good faith unless shown by clear and convincing evidence to the contrary." We, therefore, do not believe that additional rules or regulations are appropriate or necessary and will not modify our rules at this time to include language specific to "reasonable" rates for commercial leased access. This action does not prevent parties from filing commercial access dispute petitions that have met the prior adjudication standard based upon unreasonable rates, terms and conditions.

36. *Other Issues.* A number of other issues were raised by the commenters regarding the requirements of Sections 611 and 612 of the Cable Act. The law firm of Farrow, Schildhause, Wilson & Rains (Farrow) raises a number of constitutional questions regarding access channels. Farrow suggests that the forced opening of a cable system to PEG and commercial access may be the taking of private property for public use without just compensation or an improper restriction on the First Amendment rights of cable operators. Farrow suggests that the Commission consider raising these constitutional questions and staying access obligations while this question is being litigated. Farrow also proposes that the Commission allow special relief petitions against franchising authorities to permit an operator to test the constitutionality of Section 612(h) of the Cable Act. This subsection allows a franchising authority to prohibit a local cable system from carrying leased channel programming that local authorities consider obscene.

37. With respect to the constitutional questions raised by Farrow concerning channel access, similar access matters have been before the courts and have been found to be constitu-

tional.[27] Further, the Commission is charged with implementing the Cable Act in a timely fashion. We do not believe that grant of a stay of all channel access obligations, until all constitutional questions regarding the Cable Act are resolved, is appropriate here.

38. Western Communications, Inc. (WCI) and Gill Industries, in their comments, request clarification of the commercial channel access requirement. They are concerned that a cable operator could be required to permit commercial channel lessees access to the computer systems and associated hardware used by the cable operator.[28] They state that making such access mandatory would not be "reasonable" under Section 612(c)(1) of the Cable Act.[29] We concur with the commenters on this issue. We find no basis either in the legislative history or in the Cable Act that would require cable operators to afford mandatory access to control systems by third party commercial channel lessees. However, to the extent that a cable system deliberately configures itself technically to preclude commercial access, such action would likely be viewed as a direct attempt to thwart Congressional intent and could result in sanctions being imposed by a court of competent jurisdiction.

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27 *See, e.g., Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *appeal docketed*, No. 83-1800 (1st Cir. Oct. 27, 1983) (state agency jurisdiction question certified to R. I. Supreme Ct., _____ A.2d _____ (R. I. Sup. Ct. Feb. 20, 1985), and returned to 1st Cir. for constitutional questions).

28 In addressable cable systems, each converter/descrambler is normally controlled by a central computer which uses an integrated program to authorize program choices, automatically generate billing information, and produce reports and accounts for the cable system.

29 This section of the Cable Act states that the cable operator may establish rates, terms or conditions for commercial use that are sufficient to ensure that such use will not adversely affect the operation of the cable system.

39. As a final matter, Capital Cities Cable, Inc. (Cap Cities) and Hogan & Hartson request clarification concerning the definition of activated channels. Cap Cities contends that the language of the Cable Act is ambiguous. Hogan & Hartson, in its comments, requests clarification on the use of aeronautical channels and channels that have been designated for commercial uses prior to the effective date of the statute. Specifically, it believes that the Commission should declare that channel availablity will be judged by the aeronautical rules under which the cable operator elects to operate and that commercial use which commenced prior to December 29, 1984, may still be deemed commercial use for Section 612 purposes.

40. Section 612(b)(5)(A) of the Cable Act defines activated channels as "those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use." We do not believe that it is necessary at this time to define "activated channel" in our rules. We believe that the intent of the statute is clear. For purposes of compliance with the access requirements of the statute, we will consider "activated channels" to include all channels used for the provision of video and other programming services generally available to subscribers, *i.e.*, any channel used to provide cable service to subscribers. In addition, those channels not carrying any programming but capable of delivering cable service to subscribers without additional engineering modification of the system will be considered activated for the purposes of access channel allocation.[30]

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30 For example, channels that are currently set aside for future expansion of services on the cable system would be counted as "activated channels" whether or not new subscriber equipment would be necessary to receive such services. (It should be noted that there is no requirement that the cable operator provide any such new subscriber equipment necessary to receive channels designated for commercial use.) Additional system capacity that would require new equipment to be installed throughout the cable

41. With respect to the questions of aeronautical and prior commercial use, we agree with the commenters on both issues. In determining the base of channels to which the commercial channel percentage requirement is applied, it is up to the cable system to declare under which aeronautical rules it chooses to operate. Commercial use applicants cannot force cable operators to alter the aeronautical channel system under which they operate in order to affect channel capacity. As for prior commercial uses, we see no reason that a channel designated for commercial use before the effective date of the statute cannot continue to be used for the purposes of satisfying this requirement.

Section 613—Ownership Restrictions

42. Section 613 of the Cable Act establishes restrictions on the ownership and operation of cable television systems by local television broadcasters and local telephone companies.

43. *Cable/Broadcast Station Restrictions.* Section 613(a) of the Cable Act prohibits the ownership of a cable system by a television broadcast licensee whose predicted Grade B contour covers any portion of the cable community. This provision is the same in substance as Section 76.501(a)(2) of the Commission's rules. Accordingly, we did not propose any change to this rule in the *Notice*.

44. Several commenters, such as WCI and TCI, agree that Section 613(a) of the Cable Act and Section 76.501(a)(2) of the Commission's rules are equivalent and that no changes should be made to our rules. NYC recommends the adoption of the specific language of the Cable Act. The NLC believes that there is no need to retain this rule since it duplicates the statute. Marsh Media Ltd. (Marsh) believes that any television/cable crossownership rules are unconstitutional and that the Com-

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system would not be considered activated channels for the purpose of determining commercial channel requirements. In this regard, the mere absence of a cable headend processor would not, in and of itself, be an indication of lack of system capacity.

mission should refrain from enforcing these statutory provisions.

45. We believe that our current rule is appropriate and should be maintained. As the rule is currently worded, it has the same effect as Section 613(a) of the Cable Act. Therefore, we believe there is no need to substitute the language of the statute, as NYC suggests. We believe that our rules should contain the substance of the significant provisions of the Cable Act. Accordingly, we will not adopt the NLC's suggestion to eliminate this rule.

46. *Cable/Telephone Company Restrictions.* Section 613(b) of the Cable Act establishes regulations pertaining to cable system ownership by a common carrier within its telephone service area. Section 613(b)(1) makes it unlawful for a common carrier to provide video programming to subscribers in its telephone service area, either directly or indirectly through an affiliate. Under Section 613(b)(2), a common carrier is prohibited from providing pole or conduit space, or channels of communications, to any entity that it owns or controls, if these facilities are to be used for the provision of video programming directly to subscribers. These provisions of the Cable Act are similar to the cable/telephone company ownership prohibitions contained in Sections 63.54 and 63.55 of the Commission's rules. In the *Notice* we proposed only to replace the term "cable television service" with "the provision of video programming" language contained in the Cable Act.

47. Many commenters agree with our proposal to amend Part 63 of our rules by substituting "the provision of video programming" for "cable television service." BellSouth states that this amendment would permit telephone companies to provide other programming services, which was the intention of the Cable Act. The joint comments of 105 cable operators (Cable Operators) favor this proposal but add that the Commission should explicitly state that all non-textual video services including pay cable and pay-per-view are within the definition of video programming.

48. Several commenters believe that clarifications may be needed if the language of the statute replaces the wording of our rules. For example, NTIA states that the Commission should ensure that such an amendment will not prevent telephone companies from continuing to offer broadband video transport services under tariff. Centel Communications Company (Centel) believes that we should make it clear that this change in terminology has no effect on our decision to permit affiliates of telephone companies to have blanket Section 214 authorization when they propose to offer cable service outside their telephone service area.[31]

49. A few commenters believe that we should not change "cable television service" to "the provision of video programming." The Joint Cable Operators, Florida Cable Television Association and Cox Cable Communications, Inc. (Cox) state that the intent of Section 613(b) is to codify current Commission rules and, therefore, we should retain these rules as presently written. NYNEX sees no need for this change. However, if the rules are amended as proposed, they believe that the definition of "video programming" should also be adopted.

50. Several commenters address other issues not specifically mentioned in the *Notice*. The NLC believes that those rules of Part 63 that duplicate the Cable Act should be deleted. The U.S. Telephone Association (USTA) suggests replacing the term "telephone common carrier" with "common carrier." GTE believes the more appropriate term is "any common carrier . . . in its service area," as used in Section 613(b), because these rules are meant to apply only to traditional exchange telephone companies. Centel states that Note (1)(a) of Section 63.54 of our rules is ambiguous and should be modified to allow voluntary cooperation between telephone

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31 *Report and Order*, Docket 84-28, 49 FR 21333 (1984).

and cable companies.[32] Telephone and Data Systems Inc. and TDS Cable Communications Company (TDS) comments that Note 1, as currently written, makes it difficult to ascertain what type of "relationship" is permissible without a case-by-case clarification.

51. Farrow believes that telephone companies proposing to offer only broadcast signals on cable systems should not be exempt from the cross-ownership restrictions. It states that Section 613(b)(1) seems to make this clear when the section provides that telephone companies may not sell video programming. However, Farrow indicates that problems may arise since Section 602(6) changes the definition of a cable system to exempt systems carrying only broadcast signals. GTE disagrees and states that pure retransmission systems should be exempt.

52. Several cellular radio operators, such as the Cellular Telecommunications Division of Telocator Network of America, Inc. (Cellular), state that the application of crossownership restrictions to non-wireline common carriers is not justified by the policies and purposes of Section 613 and would not be in the public interest. Metro Mobile CTS, Inc. comments that the basis of the crossownership restrictions relates to the unique monopoly position held by local landline telephone exchange carriers in their telephone service areas. Non-wireline cellular operators will not have a monopoly. Further, cable operators are not dependent on non-wireline carriers for pole attachments or transmission capacity. Therefore, non-wireline carriers have no incentive for abuse, like landline carriers, and should not be affected by these restrictions. GTE, in its reply comments, believes that there is no reason to include wireline cellular operators, if non-wireline common carriers are exempted.

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32 Note (1)(a) of Section 63.54 states:

> As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.

53. We will substitute the language of the Cable Act, "provision of video programming," for the term "cable television service" in Part 63 of our rules. We believe that this change is sufficient to make the substance of our rules conform to the statute. The Cable Act is quite clear that its intention is to restrict only the direct provision of video programming to subscribers by common carriers in the same areas as they provide telephone service.[33] In this regard, we believe that the provisions of Section 613(b)(1) also apply to telephone companies proposing to offer only broadcast signals on their cable systems. While such cable systems may be exempt from other provisions of the Cable Act, it is clear that these cable systems provide video programming directly to subscribers. Therefore, without a waiver from the Commission, ownership of such a system by a common carrier within its telephone service area would be prohibited.

54. Finally, we will not apply the telephone company/cable crossownership restriction to non-wireline cellular operators and other radio common carriers.[34] Cellular operators provide telephone service to their subscribers using radio communications and do not have telephone service areas in the traditional sense. We have not applied these restrictions to non-wireline common carriers in the past and nothing in the Cable Act or its legislative history indicates that we should change this policy.

55. *Attribution of Ownership.* In the *Notice*, we requested comment on the issue of attribution for the purpose of defining ownership and control as it relates to cable system ownership by a common carrier. While the legislative history specifically states that the Commission's attribution rules apply

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33 The Cable Act defines "video programming" as that which is comparable to the programming provided by a television broadcast station in Section 602(16). We interpret this to include broadcast stations, superstations, satellite delivered cable networks and pay cable whether the subscriber fee is on a per channel or per program basis.

34 For similar reasons, these crossownership restrictions will not apply to wireline cellular operators in areas in which they operate cellular systems but do not provide wireline telephone service.

for broadcast station-cable system crossownership, it is silent on the issue of common carriers. We note that the current Commission attribution standards differ for common carriers and broadcast stations.

56. DOJ and numerous cable interests recommend that we retain the current attribution rules. NCTA/CATA states that we should not modify the attribution limits without specific direction from Congress, as the cable and common carrier rules differ fundamentally in origin and purpose. TCI believes that the attribution standards should not be relaxed since common carriers are not subject to multiple ownership rules and there is the potential for extensive passive ownership. Hogan & Hartson, in its reply comment, states that relaxation of the attribution rules would subvert the independence of the cable industry.

57. A few commenters suggest changes to the attribution rules at this time. Several of these parties favor adoption of the same standards for common carriers as for broadcasters and cable operators. Among them, the American Council of Life Insurance (ACLI) believes that the purpose of Section 613 is to develop a uniform approach to ownership restrictions. If Congress had intended a different standard for common carriers, it would have said so in the legislative history, in their view. Further, ACLI states that the current low standard unduly inhibits the availability of investment capital. BellSouth proposes to amend the attribution rules to permit the ownership of telephone companies and cable systems as long as the common parent company's ownership in the cable system is limited to no more than 50 percent of the entire ownership of the cable system.

58. We do not believe that it is appropriate to modify the attribution rules in this proceeding. First, the commenters have not submitted sufficient evidence to indicate the necessity of such an action at this time. Second, there is nothing in the Cable Act or legislative history that indicates that Congress believed this change would be desirable. Specifically, the House

Report states that it is "the intent of section 613(b) to codify current FCC rules concerning the provision of video programming over cable systems by common carriers."[35] Accordingly, we will at this time maintain the current attribution limits for common carriers with regard to restrictions on cable ownership.

59. *Rural Crossownership Exemption.* Section 613(b)(3) of the Cable Act exempts telephone common carriers from the ban on cable system ownership in rural areas as defined by the Commission. Under this subsection of the Cable Act, telephone companies will be able to own cable systems that serve rural areas without applying to the Commission for waivers. The House Report indicates that the intent of Section 613(b)(3) of the Cable Act is to eliminate all legal and administrative barriers preventing a common carrier from providing rural cable television service.[36] According to the House Report, the Commission's role is to define "rural area" and to certify that a service area meets this definition. The *Notice* made no specific proposal for this certification procedure.[37]

60. The Commission's rules currently permit telephone company ownership of a cable system in rural areas, as defined in Section 63.58, when "no cable television system is under construction or in existence within the proposed cable television service area." In other cases, the telephone company must apply for a waiver. In the *Notice*, we proposed to expand the exemption from the waiver process by deleting the phrase "if no cable television system is under construction or in existence within the proposed cable television service area" from our rules. The Commission's definition of rural area is based on

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35 *See* House Report at 56.

36 *See* House Report at 56-57.

37 Currently, a telephone company that proposes to offer cable service and qualifies for an exemption from Section 63.58 of our rules files for Section 214 authority by submitting the information described in Section 63.01 of our rules and certifies that the service area is rural and that it has applied for a franchise.

population criteria using U.S. Department of Commerce, Bureau of the Census, definitions and statistics. We proposed no changes to this definition in the *Notice*.

61. Several telephone company interests and NTIA agree with our proposal to simply delete the qualifying phrase from Section 63.58 of our rules. These parties believe that such an action is sufficient to make our rules consistent with the Cable Act.

62. Many cable interests argue that the deletion of the qualification for exemption is not justified by the legislative history or intent of the Cable Act.[38] They state that Section 613(b) of the Cable Act was amended after the House Report that the Commission relied on was written. They quote later House comments that the "policy of subsection 613(b) is that telephone companies should not provide video programming directly to subscribers in their telephone service areas." As viewed by cable operators such as the Mid-America Cable Television Association, this statement indicates an absolute ban on the provision of cable service by telephone companies in their service areas including rural areas. Further, these companies argue that the Commission exemption for rural areas was designed only "to allow them [telephone companies] to own cable systems where cable service would otherwise be denied to local residents."[39] Therefore, they state there are no grounds for eliminating the qualifying statement from our rules.

63. The Community Antenna Television Association (CATA) comments that the Commission has previously recognized the importance of independent cable service wherever possible as a matter of public policy and in the interest of fair competition. They believe that the qualification limiting telephone company ownership to those areas where independent cable service is impractical is an integral part of the definition of rural area. Thus, it should not be eliminated. Further, this limitation is justified by a "demonstrated pattern of abuse by

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38 Cong. Rec., October 1, 1984, at H10438.

39 Cong. Rec., October 1, 1984, at H10436.

telephone companies which results when these companies are unfettered in their dealings with cable systems," according to CATA.[40]

64. With regard to the definition of rural areas as it is now written, several telephone interests agree with our proposal to continue to define rural areas in terms of population. A few cable commenters, Southwestern Bell and DOJ state that this definition should be modified. Southwestern Bell believes that a broader definition is needed to bring cable service as rapidly as possible to rural areas, as Congress intended. However, they make no specific suggestion on how this should be accomplished. DOJ and others state that the definition could be improved by basing it upon a population density standard. DOJ states that the definition should be "crafted to further the policy objective of prohibiting telephone-cable crossownership except in those markets where an unaffiliated cable system would not be economically feasible." Further, DOJ notes that population density has traditionally been a yardstick used by the cable industry to determine potential viability of cable systems. Among the other commenters, Mid-America recommends that the definition include a density standard of less than 10 households per route mile.

65. A further concern of commenters is the process that a telephone company will be required to use to certify that the proposed cable service area is rural. Commenters representing telephone interests assert that the application procedures for certification pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's rules are too burdensome and should be modified or eliminated. Clarks Telephone Company *et al.* states that a simple certification that the area is rural should be substituted for the 214 application. TDS believes that all that is required for certification is a map showing the boundaries of the area to

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40 The CWA disagrees with this position. It states that the most practical means for providing cable service in rural areas is to have telephone companies offer it. These operations would be conducted with the necessary safeguards of all line-of-business operations.

be served and a statement that it meets the Commission's definition of a rural area. Eagle Telecommunications, Inc./ Colorado, among others, proposes that telephone companies certify that their service area is rural in conjunction with their cable operator registration statement.[41]

66. The cable operators that commented on this issue believe that nothing in the Cable Act or the legislative history exempts telephone companies serving rural areas from the requirements of Section 214. TCI, for example, asserts that telephone companies should demonstrate that the proposed service area is rural in their Section 214 applications. In addition, TCI states that telephone companies should also be required to project that the likely future population growth in the area (TCI suggests this be done for perhaps five years) will not remove the area from the rural category. Further, TCI believes any rural exemption request should be put on public notice and formal notification should be given to local cable operators. In its reply, Hogan & Hartson argues that the elimination of the requirements of Section 214 is contrary to the instructions of the U.S. Court of Appeals for the D.C. Circuit.[42]

67. It is clear from the statute and the comments of the Congress that Section 613(b)(3) is intended to permit telephone company ownership of cable systems in their rural service areas without any qualifications. The amendments made to Section 613 after the House Report was written have no effect on subsection (b)(3). The legislative comments referred to by the objecting cable interests were addressing a general policy. Congress has stated that cable systems in rural areas are exceptions to this policy. The proposed legislation in the House

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41 For example, this position was generally supported by the National Telephone Cooperative Association, TDS and BellSouth.

42 *National Cable Television Association, Inc. v FCC*, 747 F.2d 1503 (D.C. Cir. 1984). In that decision, the Court required the Commission to consider whether "allowing a local phone company to provide cable services will reduce the public convenience and necessity by allowing the local phone company to engage in anti-competitive practices . . . ."

Report includes this subsection exactly as it was adopted.[43] While the Commission's previous policy was to limit telephone company ownership of cable systems without the grant of a waiver to those areas where there would not be independent cable ownership, the provisions of the Cable Act require that we modify this policy. Accordingly, the exemption qualification will now be eliminated from our rules.

68. The Cable Act and legislative history state that the Commission is responsible for defining "rural area." There is no indication that Congress disapproves of the Commission's current definition. From our experience, these criteria generally define areas that are indeed rural, and are unlikely to be served by independent cable systems. Accordingly, we will not modify the existing definition of rural areas, as given in Section 63.58. For cable systems that qualify under our definition of rural, we will adopt an abbreviated process for granting Section 214 authority. In doing so, we will eliminate the burden of submitting the detailed information required by Section 63.01 of our rules. Instead, we will adopt a new Section 63.09 which will require submission of basic information on the system providing video programming and certification that the proposed service area is rural under one of the definitions contained in Section 63.58 of our rules. The Part 63 applications will be put on public notice and the public will be given an opportunity to file objections. We believe that this procedure will meet the requirement that we certify that a proposed cable system will serve a rural area without burdening either the telephone company or the Commission. We note that the Cable Act does not specifically address the issue of Section 214 authority and the certification process. However, the legislative history emphasizes the need to expedite the provision of cable service to rural areas. We believe that this simple process

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43 *See* House Report at 6, 104. This subsection is quite clear and simple. It states that "[t]his subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in *any* rural area (as defined by the Commission)." (Emphasis added.)

minimizes the administrative burden and is an important means to accomplish this goal. Finally, we do not agree with those commenters that suggest that a telephone company should be required to project the future population growth of the rural area it proposed to serve. We believe that such a requirement is not in keeping with the intent of this section of the Cable Act to foster the provision of cable service and that estimates of population growth would be highly speculative at best.

69. *Waivers.* Section 613(b)(4) of the Cable Act permits the Commission to waive these crossownership restrictions in those circumstances where a waiver is justified in accordance with Section 63.56 of its rules. TCI comments that a telephone company asking a waiver should have the burden of demonstrating that it is unlikely that independent cable service would otherwise be provided in the foreseeable future. NYNEX states that the Commission should take steps to prevent the situation whereby once a telephone company demonstrates an interest in filing for a waiver, an independent cable company states its intent to construct a cable system, thereby precluding the telephone company. Viacom International Inc. (Viacom) comments that the Commission should ascertain whether a telephone company is subject to line-of-business restrictions by the AT&T consent decree, before a waiver is granted. If so, we should ascertain whether DOJ approval is likely.

70. We note these comments. However, we believe that our current waiver rules and procedures balance the concerns of all parties. We also note that the Cable Act specifically states that "waivers shall be made in accordance with Section 63.56 . . . (as in effect on September 20, 1984)." Accordingly, we will make no changes to Section 63.56 of our rules at this time.

71. *Other Matters.* Section 613(c) of the Cable Act gives the Commission the authority to enact rules relating to local crossownership between cable systems and other media of mass communications.[44] Given this authority, we stated in the *Notice*

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44 Section 613(g) of the Cable Act defines "media of mass communications" as it is defined earlier in Section 309(i)(3)(c)(i) of the Communications

that we believed that this was an appropriate time to consider whether the cable crossownership restrictions should apply to other competing media of mass communications, such as MDS.

72. The cable interests commenting on this issue generally believe that it is unnecessary to apply cable crossownership restrictions to additional mass media, especially MDS. For example, Cap Cities states that cable and MDS typically serve different classes of subscribers with different services and that the situations where they are head-to-head competitors are the exception, rather than the rule. Viacom believes that we should not adopt cable ownership restrictions for these other competing media, unless there is evidence that such restrictions are necessary. DOJ comments that restrictions of this nature would be premature, since there is no indication of concentration of ownership of these other video technologies.

73. Other commenters on this issue believe either that there is a definite need for additional ownership restrictions or there may be such a need. The NLC recommends the initiation of a separate rule making proceeding to consider the possibility of new rules. The Connecticut PUC urges adoption of crossownership restrictions for all other media, including print, at this time.[45] TRAC/H. Geller/D.Lampert (Geller) in reply comments, states that crossownership should be prohibited between a cable operator and either an MDS licensee or a customer-programmer of MDS. While MDS has had difficulty competing with cable, MMDS will be the main competitor to

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Act of 1934, as amended. Media of mass communications are defined as:

> television, radio, cable television, multipoint distribution service, direct broadcast satellite service and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

45 TCI also comments that the Commission should not repeal its ban on network ownership of cable systems.

cable, according to Geller. Southwestern Bell states that equity requires crossownership bans for all competing media. The Anchorage Telephone Utility concurs with this opinion in its reply comments. It believes that:

> If the FCC imposes cross ownership restrictions on local broadcasters and telephone companies on the theory that it will prevent establishment of media monopolies, it must either apply the same restrictions to other competing media or eliminate the restrictions for all competing media.

74. We do not believe that additional ownership regulations are appropriate at this time. We are not aware of any concentration of ownership of the alternative video delivery systems, especially by cable operators. Further, there is no evidence that there is likely to be a problem in the foreseeable future. We again note that we have the authority to establish additional rules. If we deem such restrictions necessary, we will institute the appropriate rule making proceeding to consider the establishment of additional ownership restrictions.

75. Section 613(e) enables a state or franchising authority to own a cable television system as long as editorial control is exercised through a separate entity in order to preclude undue government control of programming. In the *Notice* we stated that we did not believe that this provision of the Cable Act has any impact on our rules. Accordingly, no proposal wss made and we will take no further action relating to this section.[46]

76. Section 613(f) of the Cable Act grandfathers any combination of interests held on July 1, 1984, to the extent such interests were not inconsistent with applicable Federal or state law or regulations on that date. In the *Notice*, we indicated that we believe this provision is consistent with our rules.

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46 The Connecticut PUC seeks a clarification as to whether a cooperative of municipalities may hold an interest in a cable system. We do not believe that this type of ownership would be in conflict with the Cable Act as long as editorial control is exercised through an entity separate from the franchising authority.

Accordingly, we proposed no changes. Nothing in the comments has convinced us otherwise.[47]

Section 621 and 622—Franchise Requirements and Fees

77. Sections 621 and 622 of the Cable Act concern franchising requirements and fees. Under Section 621, franchising authorities are authorized to grant one or more franchises within their jurisdiction.[48] This section also sets forth certain conditions regarding the construction of cable systems and the use of public rights-of-way. In addition, Section 621 requires that franchise authorities assure that no class of potential residential cable subscribers is denied service due to income class. Finally, this section of the Cable Act gives the Commission authority to require the filing of informational tariffs for intrastate, non-cable communications services. Section 622 of the Cable Act limits the franchise fee paid by the cable operator to the franchising authority to no more than five percent of gross revenue.

78. *Use of Public Rights-of-Way.* In the *Notice*, we indicated that Section 621 delineates certain conditions regarding the construction of cable systems over public rights-of-way. We stated that cable system construction is authorized over public rights-of-way and through easements designated for compati-

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47 Marsh was the only party to address this issue. In its comments and reply comments, Marsh contends that we should change the grandfathering date of July 1, 1970, of Section 76.501 of our rules to the July 1, 1984, date of the Cable Act. Also, for the purposes of grandfathering the Commission should recognize executory, as well as cognizable interests. These arguments are the same as those made by Marsh in a petition for reconsideration in Docket 20423. That proceeding will resolve the question of the extent that Marsh's own cross-interest is grandfathered. Marsh appears to be the only cable/broadcast entity that might be affected by a change in our rules. Accordingly, we do not believe these issues need be addressed here and will, therefore, give them full and appropriate treatment in the separate proceeding.

48 Recently, the courts have questioned a franchising authority's right to grant an exclusive franchise. *See Preferred Communications, Inc. v. City of Los Angeles et al.*, No. 84-5541, slip op. (9th Cir. Mar. 1, 1985).

ble uses. The Notice also stated that a property owner that has already granted or is obligated to grant an easement for utilities cannot deny cable access. However, the cable franchisee must ensure the safety and appearance of the property accessed through the easement and must bear the costs of the installation, operation or removal of the equipment.

79. Several commenters requested clarification of this language. Pacific believes that differences between the terms "designated for compatible uses" used in the *Notice* and "dedicated for compatible uses" used in the Cable Act may result in future misinterpretations of this section. A few commenters (*e.g.*, Oxford Development Corp. and Direct Satellite Communications, Inc.) claim that the statutory language should not be construed to mean that franchised cable operators have "mandatory access" rights. Other commenters suggest that the Commission should codify rules to define the Cable Act's easement requirements and obligations and the circumstances of liability under Section 621(a)(2) of the Cable Act.

80. We agree with the commenters on the use of the term "dedicated." Our use of the phrase "designated for compatible uses" in the *Notice* was not intended to be any more or less encompassing than the phrase "dedicated for compatible uses" used in the Cable Act.[49] With respect to the access issue, the House Report states that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights of way which have been granted to other utilities are in violation of this section and not enforceable."[50] Based on the legislative history and clear language of the statute, we find that a cable system does have the right to access through an easement as long as the other conditions of this section are met. Furthermore, we believe that the language and provisions

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49 Examples of such uses include easements dedicated for electric, gas or other utility transmission. *See* House Report at 59.

50 *See* House Report at 59.

of these sections of the Cable Act are generally self-explanatory and that they need not be codified by our rules.[51]

81. *"Redlining"-Prohibition.* In the *Notice*, we stated that Section 621 requires that a franchising authority assure that no class of potential residential cable subscribers be denied cable service due to income status (This practice of denying service to lower income areas is commonly called "redlining."). We stated that the franchising authority must require that all areas of the franchised area be wired. However, we indicated that the franchising authority could award separate franchises within its jurisdiction.

82. Many cable interests claim that the Commission has misinterpreted this section of the Cable Act. These commenters assert that the *Notice* indicates that all areas of the franchise area must be wired when in fact this is not the case. NCTA/CATA, in its comments, indicates that the intent of this section is to prevent "redlining" and does not require wiring of those homes that are too remote to wire economically. We agree that the intent of this section was to prevent the exclusion of cable service based on income and that this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area.

83. *Informational Tariffs.* Section 621(d)(1) authorizes the Commission to collect informational tariffs for intra-state, non-cable services offered by a cable system that would be subject to regulation by the FCC if provided on a common carrier basis. In the *Notice*, we suggested that the Commission did not need the information at this time but retains the right to collect this information in the future.

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51 In this regard, we believe that any disputes which may occur as a result of the provisions of this section are best settled at the local level utilizing the remedies available therein.

84. Several telephone company interests state that we should collect this information in order to monitor the state of the industry. Southwestern Bell is concerned that without filing tariffs, telephone companies may not find out about such services that may be common carrier in nature. DOJ claims we should require tariffs because the beneficial data they would yield outweighs the marginal cost associated with their use. Pacific, however, suggests we should not require tariffs to be filed and that this requirement is best left to the states. NCTA/CATA, in its reply comments, states that there is no basis for requiring tariffs. It indicates that such a tariff requirement would be unduly burdensome and unnecessary.

85. We continue to believe that the filing of informational tariffs at this time is unnecessary. We have recently taken action to reduce tariffing requirements for non-dominant common carriers and we see no reason to impose such a new requirement on cable systems.[52] We believe that we can effectively monitor this situation through trade publications and other materials. Therefore, we will not require that informational tariffs be filed, but we do reaffirm our authority to require them in the future should such action be deemed necessary.

86. *Franchise Fees.* Section 622 of the Cable Act specifies that the franchise fee paid by the cable operator to the franchising authority be no more than five percent of gross revenue. This section also prohibits the Commission or any other Federal agency from regulating the amount of the franchise fee or the use of the funds derived from the franchise fee.

87. In the *Notice*, we proposed to delete Section 76.31 of our rules concerning franchise standards. This rule limits the franchise fee to three percent of gross revenue with a five percent fee obtainable upon a showing of reasonableness. This rule also contains suggested, but not mandatory, procedures

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52 *See Fourth Report and Order*, CC Docket 79-252, 48 FR 52452 (November 18, 1983). *See also Fifth Report and Order*, CC Docket 79-252, 49 FR 34824 (September 4, 1983).

for the local franchising process.[53] These provisions are generally dealt with in Section 621 and other sections of the Cable Act.

88. In general, comments from individual cities and the NLC support deletion of the Commission's franchise fee rules. These parties also contend that Section 622(i) of the Cable Act specifically precludes the Commission from establishing any regulations that deal with the resolution of disputes between franchising authorities and cable operators. Several commenters suggest that the franchise rules and standards should be retained in some form. The Town of Islip, N.Y., supports retaining Section 76.31's recommended procedures for all new franchises and would have the Commission supervise negotiation of renewal between the operator and franchising authority. The American Civil Liberties Union (ACLU) recommends retaining the timely wiring standard found in Section 76.31.

89. NCTA/CATA, in its comments, suggests rewording Section 76.31 to specify that the franchise fee may not exceed five percent. NCTA/CATA also indicates that the Commission should define what is and is not to be included in the fee. In addition, NCTA/CATA suggests that the Commission specify relief procedures for cable operators seeking enforcement and interpretation of the provisions. A number of other cable interests support deleting the existing rule, but request that the Commission retain and assert its jurisdiction over any disputes that may occur regarding franchise fees. Hogan & Hartson, in its reply comments, states that the "Commission should exercise its jurisdiction to regulate franchise fees . . . to prevent the balkanization that will result if such disputes are left to the courts." Hogan & Hartson also states that the Commission

53 For example, these recommendations include that: 1) the franchisee's qualifications and construction arrangements should be approved by the franchising authority as part of a full public proceeding affording due process; 2) initial and renewal franchises should not exceed 15 years; and, 3) construction should be significant within the first year of certification and be completed under a reasonable timetable; etc.

should rule that Section 76.31 of the rules was in effect until December 29, 1984, the effective date of the Cable Act. Miami Cablevision echoes this position and further states that the Commission's rules (76.31) should be applied in full force to those fee controversies pending with the Commission on December 29, 1984.

90. After examining the record, we believe our initial proposal to eliminate Section 76.31 of the rules concerning franchise requirements and fees is the appropriate course of action. Section 622(i) of the Cable Act clearly states that "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section." We believe that this provision renders our rules invalid with respect to setting franchise fee limits.[54] Section 622 of the Cable Act spells out quite clearly the terms of the franchise fee and how it is defined and administered. Therefore, there is no need for us to further define these matters.[55] We believe that any disputes involving the franchise fee are best resolved through the courts. Accordingly, we are deleting Section 76.31 of the rules, entitled "Franchise standards." In addition, we are also deleting Section 76.30 concerning applicability of Section 76.31.[56]

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54 In this regard, the House Report states:

> Subsection 622(i) prohibits any agency of the United States, including the FCC, from regulating the amount of the franchise fee or the use to which funds collected through the fee will be put. The current FCC regulations which restrict the use of franchise fee revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the terms of this legislation. *See* House Report at 65.

55 As far as reinstating petitions that were pending prior to December 29, 1984, we decline to return them to active status. The Commission no longer has regulatory interest in adjudicating petitions that have been rendered moot by the Cable Act.

56 Section 76.30 states that the existing franchise fee rule is applicable only to systems with 1000 or more subscribers.

Section 623—Regulation of Rates

91. Section 623 of the Cable Act specifies the manner in which subscriber rates for cable services may be regulated. In particular, the regulation of basic cable service is permitted by a franchising authority whenever a cable system is not subject to effective competition.[57] The Cable Act specifically charges the Commission with the responsibility of defining effective competition and establishing standards for rate regulation. In addition, the Cable Act requires that the Commission submit a report to Congress within six years on the effect of competition in the marketplace as it relates to rate regulation of cable systems.

Definition of Effective Competition

92. In the *Notice*, we recognized the desirability of defining "effective competition" in a manner that can be easily interpreted and readily applied by a franchising authority within its community or communities. On the other hand, we noted that the definition chosen should also permit the correct identification of those situations where a cable system may have significant market power. The *Notice* also reviewed the actions taken by several states in deregulating cable television service.

93. In the *Notice*, we sought comment on what constitutes effective competition and what kinds of signals or services compete with basic cable service. We also requested comment on defining effective competition in terms of the availability of off-the-air signals in the cable system's community. In this regard, we indicated that if such a signal complement criterion were chosen, one approach would be to define effective competition in a given market as the presence of four unduplicated broadcast signals, including the programming of the three

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57 Section 623(g) of the Cable Act grandfathers for two years any existing state law which provides for any limitation or preemption of regulation by local franchising authorities. This regulation applies to cable systems franchised after the effective date of these rules, and to all cable systems after December 29, 1986. The Cable Act grandfathers certain franchise rate obligations during the two intervening years.

major networks. We also suggested that in determining whether a signal was available in a franchise area the predicted Grade B contour might be a more appropriate criterion than one based on either a specific mileage zone (*e.g.*, 35 miles) or the Commission's must-carry rules. Finally, comments were requested on whether a penetration level criterion should be included in the definition of effective competition.

94. Most of the parties filing comments or reply comments in this proceeding addressed the issues raised in this section of the *Notice*.

95. *Signal Complement Criteria.* Although little consensus can be found among the commenting parties, they generally suggest defining effective competition based on some form of signal complement criterion. Well over half of the commenters feel that the proposed requirement of four off-the-air broadcast signals is too strict. Cox, NTIA and Time Inc., for example, suggest a three signal criterion. NCTA/CATA, Hogan & Hartson, and comments submitted by the law firm of Fleischman and Walsh, P.C. on behalf of various cable television interests (VCTI), in comments representative of most cable interests, argue for a two signal criterion.[58] Other commenters argue that the four broadcast signal criterion suggested in the *Notice* is insufficient to ensure effective competition. DOJ and the Telecommunications Research and Action Center (TRAC) assert that a minimum of five broadcast signals is necessary in order for there to be effective competition with cable service.[59] The National Federation of Local Cable Programmers suggests seven signals. The NLC

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58 Both Cox and VCTI also argue that foreign broadcast station signals (*e.g.*, Canadian and Mexican) represent effective competition in some cable markets and should be counted for this purpose. Section 76.5(b) of our rules defines television broadcast station to include any "station licensed by a foreign government," and accordingly any such stations will be included.

59 DOJ also suggests that other criteria be considered in addition to the signal complement.

proposes requiring a total of ten signals including five alternative delivery channels.[60]

96. Several of the parties suggesting additional (more than four) signals also indicate that the statute requires that the Commission define the circumstances in which a "cable system" is not subject to effective competition. These parties state that a standard based on alternatives to "basic cable service" only, as suggested in the *Notice*, is not appropriate given the statutory language. This view was expressed by NLC and the City of New York, among others. DOJ and a number of other parties believe that the Commission was correct in limiting the question of effective competition to basic cable service. These parties note that franchise rate regulation authority is limited to regulation of basic cable service.

97. Several parties in their reply comments criticize the Department of Justice's proposals for an effective competition standard based on five signals. They state that DOJ provides little justification other than supposition and intuition. On the other hand, an empirical study by NCTA/CATA was cited by many as providing factual support for a standard based on fewer than three signals.

98. After full consideration of the record on this issue, we continue to believe that a standard for defining effective competition based on the availability of off-the-air broadcast signals in the cable system's community is appropriate. In adopting this definition, we do not mean to minimize the importance of the various alternative sources of video programming such as multipoint distribution services, direct satel-

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60 In addition to NLC, a number of commenters (irrespective of their views on the number of signals) support the inclusion of various alternative delivery systems in our effective competition standard. *See, e.g.*, comments filed by the U.S. Conference of Mayors, VCTI, TRAC, and the U.S. Catholic Conference. Other parties argue that the programming provided on these systems (STV, MDS, MMDS, and DBS) is most substitutable with that provided on the pay cable channels and therefore should not be included.

lite reception, and video cassette recorders.[61] Such services are significant providers of video programming services and do, in fact, offer competition to cable services.[62] Congress has already made the decision that nonbasic services should not be subject to such regulation at either the federal or local levels.[63] This decision appears to have been made based, at least in

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61 In this regard, we note that the Cable Act amends Section 705 of the Communications Act of 1934, as amended, to permit the reception by individuals of any satellite cable programming for private viewing. This action significantly increases the programming options available to all viewers. We also note that the Commission has proposed preemption of certain restrictive local zoning regulation of satellite receive-only antennas. *See Notice of Proposed Rule Making*, CC Docket No. 85-87, FCC 85-144, adopted March 28, 1985.

62 *See Report and Order* in Docket No. 83-670, 49 FR 33588 (August 23, 1984); *Report and Order* in Docket No. 19142, 96 FCC 2d 634 (1984); *Report and Order* in Docket No. 83-1009, 49 FR 31877 (August 8, 1984) and *Memorandum Opinion and Order* in Docket No. 83-1009, 50 FR 46666 (February 1, 1985).

63 Some commenters express concern that cable systems may have market power in the provision of nonbasic service and that this power could be extended to their provision of basic service. Therefore, these commenters contend, rate regulation of basic service should be permitted whenever there is a lack of competition in nonbasic service. We believe the commenters' argument is based upon a concern about the marketing practice of cable operators whereby consumers can subscribe to a pay tier only if they *also* subscribe to the basic tier. This marketing practice, often called a "tying arrangement," is addressed in the antitrust literature. We believe that the commenters' argument is incorrect. This is so because a cable operator has the ability to charge a price for nonbasic service that is the most profitable. He, therefore, has no incentive to raise basic service rates in order to earn increased profits. Thus, we believe that the manner in which cable operators market basic and nonbasic services represent an efficient business practice and is not a threat to the competitive provision of basic service. "The law's theory of tying arrangements is merely another example of the discredited transfer-of-power theory, and perhaps no other variety of that theory has been so thoroughly and repeatedly demolished in the legal and economic theory." *See* Robert H. Bork, *The Antitrust Paradox*, 1978, p. 372. Accordingly, we see little point in determining whether a cable system may have market power in the provision of a service that a franchising authority is prohibited statutorily from regulating.

part, on a belief that alternative video delivery systems provided sufficient existing or potential competition to nonbasic services that rate controls would be counterproductive. However, the Cable Act requires the Commission to look at competition for the limited purpose of determining in what situations rate regulation of basic cable service may take place. For the most part, programming provided by basic cable service includes local, over-the-air signals and other services. Therefore, we believe that a standard based on the reception of terrestrial television signals is appropriate and provides a reasonable benchmark for determining effective competition with basic cable service. Furthermore, we feel that this standard meets the congressional intent of an administratively manageable standard for the Commission, franchising authorities and cable operators.

99. *Number of Signals Required.* The number of over-the-air broadcast signals required to provide effective competition to basic cable service must be sufficient to allow viewers adequate and significant programming choices. Further, the number of signals should ensure that the basic tier offering does not become a source of market power for the cable operator. Based on the record in this proceeding, we believe that three broadcast signals are the minimum number of signals needed to meet these objectives. A limited statistical sampling of two, three, four and five signal markets using Arbitron viewing data provides further evidence to support this conclusion.[64] In comparing the cable viewership of the programming which is most likely to be included in the basic tier with the off-air local broadcast viewership, we found that in two signal markets the viewership share of such programming could be as large or larger than the off-air viewership of the typical local station in such a market. This could potentially be a source of market power for the cable operator. In three signal markets, the cable viewership of such basic programming was in general less than the off-air viewership of a single local

64 *See* Arbitron *1982 County Coverage Surveys, Cable-Controlled.*

signal.[65] In the worst case, the impact of the provision of basic service programming would be comparable to adding one more competitor to a (three competitor) market. Further support for the reasonableness of an effective competition standard of three signals can be found in the economic literature. In an empirical study of American industry, Kwoka demonstrated that the presence of a third competitor of sizable market share may be sufficient to guarantee competition in a given industry.[66] For the case at hand, involving at least three broadcast signals and a cable system, there will generally be not just a third but a fourth competitor of sizable market share. Accordingly, we feel that the programming of basic cable service is not likely to be a significant source of market power in these circumstances and that retaining the four signal standard proposed in the *Notice* could subject a number of cable systems to unnecessary rate regulation.

100. Therefore, after careful consideration of the arguments presented as to the appropriate number of broadcast signals required for effective competition with basic cable service, we have decided to relax the effective competition standard proposed in the *Notice*. We now conclude that the existence of three or more off-the-air broadcast signals in the cable market provides viewers with adequate programming choices and presents an effective constraint on the market power of a cable system in the provision of basic service. We recognize that many cable systems provide a number of services in addition to the retransmission of off-the-air signals. For example, a cable system may typically provide additional broadcast signals, access channels, and certain satellite delivered programming on

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65 Viewership of basic cable services (excluding must-carry signals) ranged from three quarters to approximately equal to the off-the-air viewership of the typical local signal, which in this sample was about 33%. We feel that a market or viewership share of 33% or less is a reasonable indication of lack of market power. *See U.S. v. Aluminum Co of America et al.*, 148 F. 2d 416, 424 (1975).

66 *See* John E. Kwoka, "The Effect of Market Share Distribution on Industry Performance," *Review of Economics & Statistics*, Vol. LXI, No. 1, February 1979, pp. 101-109.

its basic cable tier.[67] Nevertheless, we do not believe that a cable system gains significant market advantage by the provision of this additional programming in those markets where there are sufficient (*i.e.*, three or more) off-the-air broadcast signals.[68] Accordingly, a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals.[69]

101. *Program Content of Signals.* In the *Notice*, we proposed that the programming of three major networks be included as part of the signal complement requirement. A number of commenters support this network programming requirement. For example, DOJ, NLC, the Department of Defense, and TRAC concur with this position. These parties believe that a cable system could conceivably gain market power by importing a signal which provides network programming not receivable off-the-air in the franchise area. Several commenters, NCTA/CATA, VCTI, NTIA, Heritage Communications, Inc., Hogan & Hartson, and California Cable Television Association (CCTA), among others, oppose any

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67 Examples of satellite delivered programming or cable networks are the Entertainment and Sports Programming Network and Cable News Network.

68 The existence of market power depends on both the level of demand for a particular product and the elasticity of that demand. For these additional basic services to be a source of market power, it must first be shown that a significant demand exists for these services and that such demand is relatively inelastic. None of the commenters were able to present any evidence to support either of these contentions. In fact, several of these same commenters readily concede that no market power is obtained from the provision of some of these additional services, such as the public access channels. In this regard, it should also be noted that most satellite services presently provided on cable systems either are not rated or have very small viewing shares according to the national rating services.

69 Furthermore, we also agree with those commenters that state that it was the intent of the Cable Act to significantly deregulate the provision of cable service. We believe that a requirement of five or more signals would not have the effect that Congress clearly intended.

programming content requirement.[70] In its comments, VCTI argues that past Commission policies (*e.g.*, spectrum allocation, must-carry rules, etc.) have not been based upon some "entitlement" of viewers to the programming of the three major networks. In addition, VCTI points out that independent and noncommercial programming have become increasingly popular and that the presence of either in a market may contribute more to programing diversity than the offering of a third network affiliate.

102. After weighing the arguments presented on both sides of the issue, we conclude that a programming content requirement based on major network programming should not be included in the Commission's standard for effective competition.[71] We continue to have significant First Amendment concerns with any requirement based on the programming content of broadcasters. We also note that such a requirement would not be consistent with our past efforts to foster alternative program sources. For these reasons, we will not adopt such a requirement.

103. *Signal Availability Standard.* The *Notice* indicated that if a broadcast signal standard is chosen, a method must also be developed for determining when a signal is available in a given franchise area. A number of approaches were suggested in the *Notice* including counting all signals within a specific mileage zone (*i.e.*, the 35-mile zone) and a standard based on the Commission's must-carry rules.[72] In the *Notice*, we suggested a standard based on counting stations that placed a

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70 CCTA also argues that duplicated signals should be counted. It notes that programming duplication is not an issue in either television license renewal or must-carry requirements.

71 It should be noted, however, that in the vast majority of markets with three or more unduplicated signals, the programming of the three major networks is provided.

72 Must-carry signals include all television stations within a 35-mile zone, certain Grade B contour signals and signals that have attained significantly viewed status within the cable community. *See* Sections 76.54, 76.55, 76.57, 76.59 and 76.61 of the Commission's rules.

predicted Grade B signal contour over the cable community. Comment was also requested on whether a penetration level should be included in our definition of effective competition.

104. Most cable interests and certain other parties suggest counting a signal if it meets any of the must-carry requirements. For example, NCTA/CATA, VCTI, TCI, Cap Cities and CCTA, argue that a signal should be counted if it satisfied any one of a number of criteria, such as Grade B, significantly viewed, 35-mile, or must-carry. NTIA, Hogan & Hartson and Time, Inc., support the Grade B contour criteria proposed in the *Notice*. They indicate that the Grade B proposal is the most cost-efficient and easiest to administer alternative.

105. The majority of the parties associated with the local franchise process and a number of other commenters support a stricter standard for counting signals. NLC and TRAC argue that the 35-mile zone criterion should be used. ACLU and the Cable Television Information Center support using the Grade A city contour. Several commenters, for example, the National Association of Towns and Townships, the Vermont Department of Public Service, DOJ and the Department of Defense argue for a standard based on "actual" as opposed to predicted reception. In addition, a requirement that cable penetration be less than 70% was supported by several of these parties including the NLC and TRAC.[73] These commenters cite penetration as a good indicator of the dependence of viewers on cable service for adequate reception of local broadcast signals.

106. The choice of an appropriate signal reception criterion is a difficult one. The use of any of the above alternatives will result in some cable systems being judged to have effective competition when in fact reception of three or more signals may not always be possible in the franchise area. On the other hand, some cable systems will be judged, whatever the alterna-

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73 Several states have such a penetration requirement for statewide deregulation of cable systems. DOJ proposes a variation based on the maximum penetration level of basic service. Specifically, it suggests basic-only subscribers must be less than 20% of all subscribers for there to be effective competition.

tive chosen, to not face effective competition when in fact the majority of homes in the franchise area are receiving more than three broadcast signals. Since no compelling arguments were given to the contrary, we believe that weight should be given to the administrative convenience of implementing a signal availability test.

107. Furthermore, given the intent and purposes of the Cable Act, we feel that in developing a standard for the purposes of rate regulation, it is more appropriate to favor a presumption that competition does in fact exist rather than to assume that consumers will make no efforts to seek out alternatives to basic cable service. Clearly, in this regard, there is considerable evidence viewers do take significant measures, such as improved antennas, use of rotors and amplifiers, to receive broadcast signals they deem desirable even if those viewers are in areas with fringe or marginal reception. Accordingly, at this time, a signal will be counted for purposes of effective competition if it places a predicted Grade B contour over any portion of the cable community or is significantly viewed within the cable community.[74] However, in order to ensure that franchise authorities are permitted to rate regulate in those areas where there is not effective competition, franchise authorities may submit showings and engineering studies

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74 We believe that "significantly viewed in the cable community" will give a more accurate analysis of those signals that are available in the cable community and eliminate any problems this standard may have within hyphenated communities. In addition, a number of parties submitted comments on the issue of availability of broadcast signals from television translators. For example, VCTI, Cox, and Hogan & Hartson present arguments for the inclusion of such signals in the determination of effective competition. We agree that broadcast signals of translator stations should be considered. However, in view of the varying power and the relatively small geographic service area of translator stations, we believe that it is inappropriate to count translators on an equal basis with broadcast stations. Accordingly, signals of translator stations shall be counted only if such stations are located within the cable community; provided, however, that translators used to retransmit a station already providing a Grade B contour or significantly viewed within the cable community may not be considered for this purpose.

to indicate that such signals are in fact not available anywhere within the cable community. Such studies shall include field strength measurements made in accordance with Section 73.686 of the Commission's rules.

108. With regard to any additional criterion based on cable penetration figures, we are unconvinced that such statistics are reliable indicators of broadcast reception problems. We believe that cable subscriber penetration is determined by a number of factors other than the availability of off-the-air signal reception. More specifically, price, quality of service, income and area viewing tastes will all have a significant impact on the demand for cable service and the resulting subscriber penetration of cable service within a particular area. We find that the adoption of a penetration standard would be arbitrary and unjustifiable for the thousands of cable communities that not only have varying television reception, but also include viewing households with divergent incomes and tastes. We are also sympathetic to commenters' arguments that a penetration criterion would penalize cable operators who have attained substantial subscriber penetration by providing low-priced popular cable offerings and services. In this regard, we believe that a penetration standard could create a disincentive for cable operators to upgrade the quality and level of the services they now provide. Accordingly, we conclude that adoption of a cable penetration criterion as part of the effective competition standard would not be in the public interest.

109. Several commenters express concern that some cable systems maybe susceptible to disruption in their long term plans due to the nature of our definition of effective competition. For example, a system operating in a market within three Grade B contours could become subject to rate regulation if one of the broadcast stations should go dark (even temporarily), reduce its power, or directionalize its signal. In this regard, Cox, in its comments, proposes that once a market satisfies the criteria for effective competition, it cannot be reclassified. While we are sympathetic to a cable operator's desire for regulatory certainty, we believe that this solution would be

contrary to the intent of the statute and would ignore those situations where effective competition might be removed. Accordingly, in those situations where a cable system has been found previously to be subject to effective competition but subsequently was found to not be subject to effective competition due to changed circumstances in the cable system community, the cable system shall be exempt from rate regulation for a period of at least one year. We believe that this one year period will allow a cable operator sufficient time to make the transition from an unregulated to a regulated entity.

Standards for Rate Regulation

110. Section 623 of the Cable Act also requires that the Commission establish standards for the regulation of basic cable rates by a franchising authority. In the *Notice*, we noted that this involves not only specifying what services can be regulated but also in what manner. Thus, we must define "basic cable service" for the purpose of rate regulation and establish the standards for such rate regulation. These issues are discussed in turn.

111. *Definition of Basic Cable Service.* Section 602 of the Cable Act defines basic cable service as "any service tier which includes the transmission of local television broadcast signals." The House Report encourages the Commission "to fashion a definition of basic cable service most appropriate to achieve the purpose of the regulations consistent with the provisions of Title VI." In this context, we stated in the *Notice* that it was appropriate to include "significantly viewed" as well as local signals. Accordingly, we proposed defining basic cable service as "any service tier(s) which include(s) the retransmission of must-carry television broadcast signals as defined in Sections 76.55 to 76.61 of the rules."

112. There is considerable disagreement among the parties with respect to the Commission's discretion to develop a definition of basic cable service for the purposes of rate regulation different from that contained in Section 602 of the

Cable Act. NCTA/CATA states that the Cable Act generally reflects Congressional endorsement of the Commission's prohibition on regulation of rates for optional services and therefore gives the Commission discretion to alter the definition of basic cable service in developing standards for rate regulation. In this regard, it quotes extensively from the House Report:

> The Committee wishes to stress that it intends to give the Commission flexibility in promulgating these regulations. The definition in Sec. 602 of basic cable service is intended primarily for use in determining the extent of regulation that will be permitted during the . . . transition period. The regulations of the Commission under this subsection serve a different purpose—defining the circumstances and extent of regulation that may occur beyond the transition period.

NCTA/CATA does not, however, support the Commission's proposed definition. It states that the definition in the statute as well as our proposed modification would permit regulation of multiple tiers of basic service where a cable system offers a lowest-priced basic tier that includes retransmission of local broadcast signals and also offers another tier at a single, higher price that includes everything on the lowest-priced tier plus additional services. NCTA/CATA states that while the statute permits this practice during the two-year transition period as the result of a political compromise, the Commission's preemption policies and the Cable Act's endorsement of the Commission's prohibition on regulation of rates for optional services requires that the Commission prevent such rate regulation from continuing beyond the transition period. Thus, NCTA/CATA recommends that the Commission make clear that basic cable service includes no more than the lowest priced tier of service that includes all local broadcast signals. In addition, NCTA/CATA urges the Commission to affirm that basic cable service includes only the retransmission of local broadcast signals and that any ancillary services provided along with basic service should not be deemed "basic service." Thus, NCTA/CATA asserts, regulated cable systems would be

free to remove or retier any of these other services. Such a statement, NCTA/CATA asserts, would simply reaffirm the Commission's fundamental policy in this area,[75] and nothing in the Cable Act requires the Commission to set aside its previous decisions.[76]

113. NTIA states that the Commission "clearly has the power, and probably a mandate to adopt a definition of 'basic cable service' different than the one contained in Section 602(2) in order to further effectuate the purposes of the Cable Act." NTIA proposes that the Commission adopt a definition of basic cable service which is based on the retransmission of unaltered broadcast television signals rather than one based on must-carry signals, as proposed in the *Notice*. NTIA states that this alternative definition would ensure that franchising authorities whose cable systems are outside of all television markets (*i.e.*, areas where there are no signals which cable operators are required to carry under the must-carry rules) have the authority to rate regulate the basic service of these cable systems if they are not subject to effective competition. NTIA states that this proposal more fully carries out the intent of the statute.

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75 *See Community Cable TV, Inc.* (hereinafter *Community*), 95 FCC 2d 1204 (1983) and *Community Cable TV, Inc.*, (Reconsideration), 56 RR 2d 735 (1984).

76 The individual cable interests that filed are in general agreement with NCTA/CATA's proposed definition of basic cable service, giving equal support to the concept that basic cable service should include either (1) must-carry signals only; or (2) the lowest-priced tier which contains the must-carry signals. In addition, they state that cable operators must retain the freedom to retier ancillary services out of "basic service" granted them by the Commission's decision in *Community*. These parties include PCTA, TCI, Cap Cities, VCTI, New Jersey Cable Television Association, Time (reply comments), CCTA, Cox, Cable Operators and Hogan & Hartson. We also note that several parties urge that the PEG channels be included in the definition of basic service. These parties include TCI, the City of Boston, the U.S. Catholic Conference, and the New York Citizens' Committee for Responsible Media.

114. The Department of Justice believes that the Cable Act sanctions the Commission's decision to preempt state and local rate regulation of all but basic cable television service. However, it states that it is not clear whether the Commission has discretion under the Cable Act to define basic cable service. It states that the Cable Act does not authorize the Commission to define basic cable service either generally or for purposes of Section 623. "While the legislative history does suggest that the Commission may 'fashion a definition of basic cable services most appropriate to achieve the purpose' of its 'effective competition' criteria, . . . it seems apparent that the Commission could not define 'basic cable service' inconsistently with the Act, *e.g.*, limited to the must-carry channels." DOJ believes, however, that the Commission's proposed definition of basic cable service that interprets local television broadcast signals as the must-carry signals is a proper interpretation of the statute, supported by the legislative history.

115. NLC states, in its reply comments, that the Commission's responsibilities under Section 623(b) of the Cable Act should be construed in the context of the plain language of the Cable Act and the purpose of the section to allow for rate regulation in communities when the cable system is not subject to effective competition. NLC agrees with DOJ that the Commission has little discretion to fundamentally alter the definition of basic service contained in the Cable Act. In this regard, NLC states that Congress considered and ultimately rejected both definitions of basic service proposed by the various cable parties (*i.e.*, must-carry signals and the lowest priced tier which includes the must-carry signals). NLC states that the definition of basic service contained in the Cable Act is intended to establish regulatory certainty and stability where conflicting court decisions created confusion with respect to the proper definition of basic service. NLC believes that the definition contained in the statute establishes the necessary distinction between basic and nonbasic services.

116. After careful consideration of the full record in this proceeding including the statute, the legislative history and the comments, we conclude that the Commission does have the

discretion to fashion a definition of basic cable service different from that contained in Section 602(2) of the Cable Act for the purpose of developing rate regulation standards. While some tension may be created by adopting a definition of basic service for Section 623(b) of the Cable Act that differs from the definition in Section 602(2), we believe that there is legislative guidance that permits such a change. First, in adopting appropriate regulatory standards we must keep in mind the underlying purposes of the Cable Act which are articulated in Section 601. Foremost among these is the intent of the statute to establish "standards which encourage the growth and development of cable systems . . . , assure that cable communications provide . . . the widest possible diversity of information sources and services to the public" and "promote competition in cable communications and minimize unneccessary regulation that would impose an undue economic burden on cable systems." We believe that we must implement Section 623(b) consistent with these statutory goals.

117. Reflecting these procompetitive goals of the statute, Section 623 preempts rate regulation of all cable services provided by those cable systems subject to effective competition. In this regard, it is consistent with the Commission's long-standing policy to preempt local regulation of non-basic or "pay" cable services, based on the premise that "unnecessary rate and tariff requirements can stifle price competition and service and marketing innovation."[77] As most recently reaffirmed in *Capital Cities Cable, Inc. v. Crisp*, only preemption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country."[78] We also note that in preempting rate regulation of basic service of these cable systems, Section 623 goes even further than the Commission's preemption policy. The Cable Act authorizes local rate regula-

77 *See Community* at 740.

78 *See Capital Cities Cable Inc. v Crisp*, 104 S. Ct. 2694 (1984).

tion only for the provision of basic cable service for those cable systems not subject to effective competition and gives the Commission the responsibility to prescribe rules to make effective the national policy with respect to rate regulation of these systems. We believe that the statute and legislative history give the Commission broad discretion to implement this provision consistent with the provisions of Title VI.

118. With this mandate in mind, and in light of the comments, we are convinced that the definition of basic cable service contained in Section 602(2), even with the modification proposed in the *Notice* should not be applied to Section 623(b).[79] To do so, we believe, could induce an expansion of rate regulation of cable systems that is inconsistent with the basic goals of the statute. Such a definition of basic service would permit a franchising authority to regulate multiple tiers of cable service where a cable system prices its tiers on a cumulative rather than an incremental basis.[80] Thus, while some cable systems subject to these provisions would have one regulated tier, many systems could have multiple tiers under

79 The definition of basic cable service contained in Section 602(2) applies to Section 623(c) which sets forth the scope of permissible rate regulation during a two-year "transition period" before the Commission's rate regulation rules become effective for all cable systems. This definition of basic service is appropriate for this subsection because we believe this subsection endeavors to paint a broad brush of permissible activity so as not to cause any immediate dislocations in existing agreements between franchising authorities and cable systems.

80 We note that the legislative history of Section 602(2) indicates that Congress contemplated that "basic cable service" as defined therein could include multiple tiers of "basic service." *See* House Report at 40. However, the House Report also indicates that the Commission should not be bound by the Section 602(2) definition, except during the two year period between the passage of the Cable Act and the effectiveness of rate regulation under Section 623. *See* House Report at 66. Accordingly, the fact that the Section 602(2) definition of basic tier can include multiple tiers is not controlling within the context of Section 623. For these purposes, we believe the better definition of "basic service" should be limited to a single tier.

regulation, and some systems could have all their tiers regulated.[81] Most of these regulated tiers would include services that are universally considered to be "pay" services. This is an unreasonable outcome for two reasons. First, if at all possible, a regulation should not be so constructed that its impact depends upon the manner in which the service is marketed or delivered, as would be the case with this proposed definition.[82] Second, this definition would permit rate regulation of services which has been determined on numerous occasions in the past are best provided on an unregulated basis.[83] Nothing in the statute supports a determination that we must permit the pay

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81 For example, consider the following cases:

Cable system I provides service as follows:

Tier A - "must-carry" signals and access channels
Tier B - satellite delivered services such as ESPN and CNN
Tier C - pay services such as HBO and Showtime

Cable system II, according to its franchise agreement, provides the same services as follows:

Tier A - "must-carry" signals and access channels
Tier B - "must-carry" signals and access channels + satellite delivered services such as ESPN and CNN
Tier C - Tier A and B services + pay services such as HBO and Showtime.

While both cable systems are providing the same services, under the Section 602(2) definition of basic cable service Tier A on Cable system I could be regulated by the franchising authority while Tiers A, B, and C on Cable system II could be subject to rate regulation. We believe that such a result is clearly not intended by the statute.

82 In this regard, we disagree with the comments of the NLC that the definition of basic cable service contained in the statute establishes the necessary distinction between basic and nonbasic services. On the contrary, we believe that this definition fails to draw any meaningful distinction between these two services.

83 *See United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

services of these cable systems to be rate regulated. We, therefore, intend to modify the definition proposed in the *Notice* and adopt the following definition of basic cable service for rate regulation purposes:

> Basic cable service is the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast television signals as defined in §§ 76.55 to 76.61 of the rules, [or, in the absence of at least three must-carry signals, any unaltered broadcast television signals] and the public, educational and governmental channels, if required by a franchising authority under Section 611 of the Communications Act.[84/85]

This definition of basic service resolves the problems created by the definition contained in Section 602(2) of the Cable Act. In addition, it creates a reasonable, historically based, demarcation between basic and nonbasic services which will permit the rate regulation of only the core or "basic" offering of those cable systems not subject to effective competition.[86] We believe, therefore, that it is consistent with the goals of the statute and longstanding Commission policy.

119. As a final matter, we note the comments made by some parties that the definition of basic cable service adopted in Section 602(2) is inconsistent with our decision in *Commu-*

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84 This definition is preferable to the "lowest-priced" tier proposal of many of the cable interests. In general, we believe it is imprecise to define a service by its price. Further, in this instance, such a definition would appear inappropriate as the price of the tier in question is to be determined by the regulatory authority.

85 For purposes of rate regulation under Section 623 of the Cable Act, superstations or satellite delivered television signals shall not be considered unaltered broadcast television signals as defined in basic cable service. *See* paragraph 27 *supra*. Further, where a cable system carries a large number of unaltered broadcast signals, the Commission may consider waiver requests for permission to retier these signals.

86 In *Community*, we stated that basic subscriber service consists of that service regularly provided to all subscribers, and that basic service must contain all the signals mandated by the Commission's rules.

nity.[87] These parties believe that the statute intentionally reject the policies underlying that decision. We believe that a fair reading of the statute would not support that conclusion. We determined, in *Community*, that the cable operator must have discretion in the selection and packaging of its programming services consistent with First Amendment freedoms and the rigors of the economic marketplace. In this regard, we stated that a cable operator "is free to add, delete, or realign its service as long as the basic service contains all the signals mandated by the Commission's rules."[88] We believe that the statute goes far to ensure that no restrictions are placed on cable systems that unnecessarily restrict this freedom.

120. Several sections of the Cable Act place limits on a franchising authority's power to regulate cable programming services. Section 624 specifies that for new franchises, and renewals of existing franchises, the franchising authority may not require a cable system, either directly or indirectly, to provide particular video or other information services or even a broad category of such services. Further, the franchising authority may only enforce requirements in the franchise for broad categories of these services. Section 625 specifies procedures available to cable operators in seeking modifications of their franchise obligations. With regard to programming, it provides in subsection (a) that a cable operator may obtain modification of a requirement for services contained in its franchise if it demonstrates to the franchising authority or in court that the "mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification." Subsection (c) permits the cable operator upon 30 days' advance notice to the franchising authority to rearrange, replace or remove a particular cable service if the service becomes unavailable or is available only with substantially higher copyright fees for which the operator has not

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87 *See* comments of DOJ and NLC.

88 *See Community* at 9. *See also* In re: Cox Cable New Orleans, Inc. v. City of New Orleans, *Memorandum Opinion and Order*, FCC 85-106, adopted March 5, 1985.

otherwise been specifically compensated. Subsection (d) provides that a cable operator may freely retier or repackage services where the tiers involved are not subject to rate regulation. Finally, Section 9(b) of the Cable Act grandfathers any retiering, repricing or deletion of services pursuant to the *Community* decision, as of September 26, 1984.

121. We believe that the Cable Act does not substantially alter the Commission's *Community* decision and that these sections of the Cable Act, taken together, afford the cable operator substantial freedom to replace and retier its services. Section 625(d) gives cable operators complete freedom to retier and repackage programming services among the tiers that are exempted from rate regulation, notwithstanding any provisions in the franchise agreement to the contrary.[89] When the Commission's rules become effective after the two-year transition period the majority of cable systems will be exempted from all rate regulation. Most cable operators will, therefore, have complete freedom to retier and repackage all their "basic" and "pay" programming services. Those cable operators subject to rate regulation will have their freedom to retier and repackage restricted somewhat by the statute, but this constriction is applicable only to programs on their regulated tiers. In addition, any cable operator subject to regulation may obtain a modification of a franchise programming obligation under Section 625(a) after demonstrating to the franchising authority that the proposed modification will maintain the mix, quality and level of the programming services. While this provision may in fact limit the cable operator's freedom somewhat during the two-year transition period, we do not believe it will be burdensome after this period because most cable systems will not have any regulated tiers of service and, of those

89 Unlike *Community* which permitted unrestricted deletion (with no replacement) of a programming service, we believe that the Cable Act prevents cable systems from deleting a program service except where the particular category of programming is no longer available, or available only at a substantially higher, uncompensated price.

systems that do, only the one tier that contains basic cable service will be regulated.

122. *Regulatory Process.* Section 623 of the Cable Act also specifies that the Commission has the responsibility of developing the procedures and methodologies which a franchising authority must follow in regulating basic cable service rates. In the *Notice*, we proposed a number of administrative procedures for the rate setting process. For example, we indicated that there should be formal notice to the public, an opportunity for interested parties to make their views known, and a formal statement when a decision on a rate matter is made. We also stated that rate of return regulation of basic cable service was inappropriate due to its inherent costliness and complexity. We, therefore, proposed in the *Notice* a comparable rate method that would set the regulated basic cable service rate equal to the level in comparable unregulated markets. To ensure greater flexibility and ease of implementation, we also proposed a plus or minus ten percent "zone of reasonableness" of the average rate of the comparable cable systems.

123. Few objections were raised with the administrative procedures proposed in the *Notice*. Accordingly, we will require franchising authorities in exercising their right to regulate basic rates to provide (1) formal notice of a rate standard (or change thereof) to the public; (2) opportunities for interested parties to make their views known, at least through written submissions; and (3) a formal statement (including summary explanation) to the public when a decision on a rate matter is made. In response to concern expressed in comments filed by city of Winona, Mn., we acknowledge that such procedures would not be binding in the two year transition period provided for existing franchises.

124. Many parties urge the Commission to assume the role of arbiter of last resort in disputes between cable operators and franchising authorities. Due to the large and growing number of cable systems and the limited resources of the Commission, our role must necessarily be limited. At this time, we view our

responsibilities as largely restricted to the interpretation of our new rules and to those areas where the Cable Act calls specifically for Commission intervention. We believe that other matters must generally be settled through public hearings, negotiations, and, if necessary, by the courts.

125. With regard to the method employed by the franchising authority in establishing basic cable rates, a majority of commenters opposed the "comparable rate" method proposed in the *Notice*. The reason most often cited is the inherent complexity of objectively choosing "comparable" cable systems. As NTIA notes, "the problems associated with determining comparability could bog down rate proceedings and result in costly litigation." The majority of commenters feel that rates should be established through negotiation, although some believe that this might include the "comparable rate" or some other methods as optional tools. After deliberation, we concur that the means by which the appropriate regulated rate is determined is best decided consistent with the statute by the local franchising authority.

126. Many commenters, for example, NCTA/CATA, NTIA, Cable Operators, Hogan & Hartson, and TCI, recommend that cost increases be automatically allowed without the delay and cost of franchising authority approval. Such "pass-thru's" would be presumably in excess of the annual 5% automatic rate increase to which most cable systems are entitled. Most commenters suggest that such "pass-thru's" should be based on identifiable cost increases. For example, increases in programming costs caused by increased distant signal copyright fees. Other commenters, such as the Cable Operators, suggest that cost increases based on the Consumer Price Index should be allowed without franchising authority approval. It is our view that the value of an automatic pass through of costs is the avoidance of *pro forma* administrative proceedings. Accordingly, our rules will permit cable systems to automatically pass through any readily identifiable increase (or decrease) in cost which is entirely attributable to the provision of basic service, *e.g.*, the price of programming appearing on the basic service

tier and copyright fees for retransmission of distant broadcast signals appearing on the basic service tier. These rate increases may be taken in addition to the 5% automatic annual increase to which most cable systems are entitled. Furthermore, they may be taken by any cable system which is not otherwise entitled to the 5% automatic annual rate increase.[90] All other rate increases must be obtained through good faith negotiation with the franchising authority.

127. As a final matter, the rules we are adopting today which implement the rate regulation provisions of the Cable Act, delineate what a franchising authority may do in the way of rate regulation. This authority, however, is permissive. The Cable Act does not, in any way, require franchising authorities to regulate rates where they find such regulation unnecessary or inappropriate. Indeed, we recognize that rate regulation in many instances may be inefficient and counterproductive to the provision of cable services within a franchise community.[91]

128. *Six Year Report.* Section 623(h) of the Cable Act requires the Commission to submit a report to Congress in six years regarding rate regulation of cable services, including recommendations for legislative changes. In the *Notice*, we proposed that this study would include an economic study of cable rates and offerings as they relate to local demographic and market characteristics as well as the degree of regulatory control. While much of the necessary data could be obtained from trade publications, a formal submission of the data may be required of a random sampling of cable operators. This

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90 It should be noted that Section 623(e) specifies that a fixed basic service rate will not preclude the use of the 5% automatic annual increase by the cable operator.

91 In light of the discretion we have granted franchising authorities with respect to implementing the rate regulation standard, it bears emphasis that the Cable Act specifically prohibits the regulation of a cable system as a common carrier or a public utility by reason of providing any cable service. (*See* Section 621(c) of the Cable Act. *See also* House Report at 60.) Furthermore, we note that neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements.

submission of data may be required of a random sampling of cable operators. This submission could be a much simplified version of the former annual cable financial report (FCC Form 326), as suggested by the U.S. Catholic Conference in its reply comments. To minimize the cost and burden of the study, only a random sample of regulated and unregulated cable systems would be utilized. In its comments, the National League of Cities emphasizes the importance it attaches to this study and suggests several data to be collected or calculated, including rates, offerings, penetrations, subscriberships, and rates of return. The California Department of Consumer Affairs in its comments recommends that the study include: (1) national and state trends in basic service rates; (2) the status of alternative delivery technologies, such as MDS, DBS, LPTV or telephone carriers; (3) the change in the number and mix of channels offered as part of basic service; (4) a summary of complaints filed with the FCC; and (5) a summary of the availability and use of leased access channels. These and other suggestions are appreciated and will be given due consideration at the time of actually designing and implementing the study.

Section 624—Regulation of Services, Facilities, and Equipment

129. *Lockboxes.* Section 624 of the Cable Act states that "[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." In the *Notice*, we sought guidance from the commenters regarding the appropriate remedy for the failure of a cable operator to abide by this subsection of the Cable Act.

130. Comments submitted by The Municipal Coalition, the Office of Cable Television of the District of Columbia, and the reply comments of NLC, state that the FCC has no jurisdiction to punish a cable operator for failure to comply with the "lockbox" requirement. VCTI states that the Commission retains jurisdiction in this area. NCTA/CATA in its reply

comments, states that the Commission retains general authority since the Cable Act is to be incorporated in the Communications Act of 1934, as amended, 47 USC 151 *et seq.*, and Section 1 of the Act gives the Commission the duty to execute and enforce the provisions of the Act.

131. The cable parties ask that the Commission clarify the meaning of this section of the statute. For example, TCI asks that the Commission state that cable operators should not be required to provide a lockbox for commercial access channels. VCTI states that the obligation to provide a lockbox should be triggered upon a judicial finding that programming is obscene or indecent. Hogan & Hartson states that these devices need only be provided to restrict viewing of programming reasonably regarded as obscene or indecent under local community standards and not for protection against all programming. Finally, all the cable parties state that the Commission should ensure that franchise authorities will not penalize them for technical problems associated with lockboxes. For example, lockboxes may cause interference on adjacent channels or they may be unable to block one channel without blocking an entire tier.

132. We believe we have the authority to ensure that the lockbox provisions of Section 624 of the Cable Act are carried out. In this regard we intend to adopt the procedures pursuant to 47 CFR § 76.7 *Special relief*, to afford the public, cable operators and franchising authorities a vehicle to ensure implementation of Section 624. We also believe that we should clarify the cable operators' responsibilities with respect to this provision. Thus, we believe that the cable operator must provide, upon subscriber request, by sale or lease, a lockbox for any channel over which it has editorial control. (This would exclude commercial access, PEG and must-carry channels.) We do not believe that a judicial or local community finding of obscenity should be a prerequisite for triggering the cable operator's obligation. Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commis-

sion's standard for indecency,[92] and would also be a significant factor in cases related to obscenity and similar offensive programming.[93] Finally, with regard to lockbox technical problems, we expect cable entities to use quality state of the art equipment and we need not resolve this issue at this time.

133. *Technical Standards.* Section 624(e) of the Cable Act allows the Commission to set technical standards related to facilities and equipment required by a franchising authority pursuant to a franchise agreement. This provision does not affect the authority of a franchising authority to establish standards regarding facilities and equipment in the franchise that are not inconsistent with standards established by the FCC.

134. The parties that commented generally support our proposal. Storer and VCTI request that the Commission reaffirm its 1974 policy statement preempting technical standards.[94] In particular, the parties recommend that we include the preemption policy in our rules.

135. In this *Report and Order* we reaffirm our policy on federal preemption of cable TV technical standards. We did not propose any changes in our preemption policy in the *Notice* and we adopt none now. In the *Notice*, we addressed the narrower issue of whether we should make any changes in the standards we have already adopted. In this regard, we note that the Commission recently adopted a *Notice of Proposed Rule Making* which proposes to revise or delete existing technical standards for cable.[95] It proposes no change in our preemption policy. We believe any revisions in our technical standards are most appropriately dealt with in that proceeding.

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92 *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

93 *See Miller v. California* 413 U.S. 15 (1973).

94 *See Report and Order*, Docket No. 20018, 31 RR 2d 1187 (1974).

95 *See Notice of Proposed Rule Making*, MM Docket No. 85-38, FCC 85-66, adopted February 12, 1985.

Section 639—Obscenity

136. Section 639 of the Cable Act establishes the Federal standards and criminal penalties applicable to the transmission of any cable service which is obscene or otherwise unprotected by the Constitution. Any violation is punishable by a fine of up to $10,000 and/or by imprisonment for up to two years. Section 76.215 of our rules provides that "[n]o cable television system operator when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels material that is obscene or indecent." We stated in the *Notice* that these criminal provisions supersede our rule and we therefore proposed to delete Section 76.215 of our rules.

137. NCTA/CATA, TCI and Viacom filed comments in support of the Commission's proposal. They state that it is appropriate to delete our rule in deference to the statute. The parties specifically note that the "lockbox" provision of Section 624 of the Cable Act provides added justification for deleting Section 76.215 of our rules.

138. The NLC states in its reply comments that the Commission has the authority under Section 624(f)(2)(A) of the Cable Act to enforce Section 76.215 of our rules. However, NLC also states that it is an open question whether government restrictions on indecent materials over cable systems are permissible under the First Amendment. Morality in Media (Morality) states that Section 639 of the Cable Act does not specifically prohibit the transmission of indecent material, as does our rule. Therefore, in the opinion of Morality, the new legislation does not supersede the Commission rule. In addition, they state that colloquys in both houses of Congress indicate that Congress expected the Commission to retain its present rule on indecent origination cablecasting. Morality, therefore, proposes that the Commission preserve the indecency concept in Section 76.215 of the rules as separate standard.

139. After careful review of all the comments, we believe it is appropriate to delete Section 76.215 of our rules. We believe that our rule is duplicative of and indeed surpassed by other

statutory provisions and, thus, the public will continue to be protected from obscene and indecent programming on cable systems despite its deletion. We note in this regard that obscene and other "offensive" programming on cable is restricted in three other provisions of the Cable Act. Section 612 gives the franchising authority the power to prohibit or restrict programming which, in the judgment of the franchising authority is obscene or "in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States." Section 624 allows cable operators and franchising authorities to specify in a franchise or renewal agreement that obscene or otherwise unprotected programming can be prohibited or restricted. In addition, Section 624 requires cable operators to offer lockboxes that will enable viewers to restrict the viewing of any given channel. Finally, Section 638 maintains all existing criminal and civil causes of action against cable operators and programmers based on the content of their services, including obscenity and other similar laws.

Section 4—Pole Attachments

140. Section 4 of the Cable Act amends Section 224(c) of the Communications Act of 1934 by adding a new paragraph Section 224(c)(3). This addition provides that a state will not be considered to be regulating the rates, terms and conditions for pole attachments for Section 224(c)(1) purposes unless it has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments and takes final action on individual complaints within the time limits specified in the Cable Act. This is in addition to the present requirement that states certify to the Commission that they regulate pole attachments under Section 224(c)(2). In the *Notice*, we proposed to amend our rules to reflect the new language contained in the Cable Act by requiring a state to include a statement in its certification that the state has issued and made effective rules and regulations implementing its

regulatory authority over pole attachments and to enclose a copy of the rules and regulations with the certification.

141. Several parties submitted comments on our proposed rule change. Most of the cable interests state that the Cable Act requires that the Commission no longer accept a state's *pro forma* certification of compliance with Section 224(c). These commenters state that under the Cable Act, the FCC now has the responsibility to review each state's certification to determine whether in fact the state has complied with the requirements of Section 224(c). In this regard, they state that our proposed rule does not explain precisely what constitutes "rules and regulations implementing the state's regulatory authority over pole attachments," and therefore does not meet the intent of the statute. These parties offer modifications to our rules. For example, NCTA/CATA, Michigan Cable Television Association and Hogan & Hartson state that the Cable Act should be interpreted to require that the state's regulations (1) be cable-specific and (2) define with reasonable certainty the methodology used in effecting pole relief. In addition, the Cable Operators propose that in addition to the filing of detailed documentation regarding the determination of certification, states be required to submit a report of any pole attachment rate decisions each year and that the Commission review these rates and consider decertifying the state if the rates fall outside a zone of reasonableness.

142. BellSouth and Pacific, on the other hand, generally support the Commission's proposed rule changes. BellSouth, however, proposes that the rules be revised to recognize that tariffs on file with the state commission be *prima facie* evidence that the state is regulating pole attachments and to clarify that a state is not required to issue its rules and regulations by the effective date of the Cable Act. Texas Power and Light Company *et al.* states that no new rules are required because the statute is clear on its face. It states that problems can be handled on a case-by-case basis.

143. After review of the comments and replies, we believe that our proposed rule, with one minor change, is the most appropriate interpretation of our new statutory mandate. Thus, we will add to the certification requirement that a state shall certify that it has issued and made effective rules and regulations implementing its regulatory authority over pole attachments. We disagree, however, with the commenters who argue that the Commission has the responsibility to review each state's certification to determine whether the state's rules and regulations comply with Section 224(c). Indeed there are no requirements in the statute as to the contents or format of the state's rules and regulations. Moreover, there is no indication in either the statute or the legislative history that Congress intended that the rules and regulations adopted by the state must be cable specific or that the Commission should define the methodology to be followed by the states. The legislative history of the original Section 224 made it clear that receipt of "certification from the State shall be conclusive upon the Commission" and that the "FCC shall defer to any State regulatory program operating under color of State law."[96] Further, no rate-setting formula was imposed on the states. Congress believed "the States should have maximum flexibility to develop a regulatory response to pole attachment problems in accordance with perceived State or local needs and priorities."[97] There is nothing in the legislative history of the Cable Act that indicates Congress has reversed this position or has now empowered this Commission to act as an arbiter as to the content or form of the rules and regulations adopted by each state. The new Section 224(c) merely makes it clear that a state will not be considered to be regulating pole attachments unless it has issued and made effective rules to implement that authority. While we will not define the methodology to be followed by the state, we believe that the rules and regulations should include a specific methodology which has been made publicly available in the state. Therefore, we will require that a

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96 *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977) at 17.

97 *Id.*

state certify that its rules and regulations include a specific methodology for regulating pole attachments. Accordingly, if the state certifies that it has rules in place which include a specific methodology, which has been made publicly available in the state, we will not inquire further unless a complaint is filed with us that alleges that a party attempted to file a complaint at the state level and could not because of the lack of appropriate procedures or that the complaint it filed with the state remained unresolved 180 days after the complaint was filed (or within the applicable period prescribed for final action if the state's rules provide for resolution within 360 days after the filing of a complaint). We believe that the requirement for a timely resolution of complaints should obviate any concern on the part of cable operators that some states may certify prematurely to the Commission that they have issued and made effective rules and regulations. Moreover, since the Commission will not examine the contents of the state's rules and regulations, we have decided that it would be unnecessarily burdensome to require that each state submit a copy of its rules and regulations along with its certification. Thus, we will delete this requirement from the proposed rules. We will, however, require that the state certify that its rules and regulations include a specific methodology. We are not persuaded to adopt the rules proposed by BellSouth. The Commission will not inquire whether tariffs are on file in a particular state, but will rely on the certification by the state. The certification may be made at any time, and the Commission will revise its list as states certify or decertify.

Regulatory Flexibility Final Analysis

144. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need for and purpose of the rules.*

The Cable Communications Policy Act of 1984 establishes guidelines for the regulation of cable service in the areas of ownership, channel usage, franchise, rate and service regulations. The Cable Act directs the Commission to take the

appropriate action in these areas in order to encourage the growth and development of cable services as well as to assure that cable systems are responsive to the needs and interests of the communities they serve. As a result of this mandate, we have eliminated some rules, modified others, and promulgated new rules. In so doing, we believe that the stability and certainty essential for continued growth and development of the cable industry has been enhanced.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues Raised.* No issues or concerns were raised specifically in response to the initial regulatory flexibility analysis. However, as a result of implementing certain tenets of the Cable Act, systems with less than 50 subscribers are now subject to Part 76 of the Commission's Rules. Also, all systems that were previously exempt from the franchise standards in our rules are now subject to the franchise standards that appear in the Cable Act. On the other hand, systems that only retransmit broadcast signals, previously subject to the Commission's cable rules, are now exempt as a result of adopting the definition of cable system that appears in the Cable Act.

B. *Assessment.* Since there were no specific comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments.* None.

III. *Significant alternatives considered and rejected.*

The Commission considered all the alternatives presented in the *Notice* and considered all the timely filed comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course of action under the mandate of the Cable Act.

145. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and the Cable Communications Policy Act of 1984, Parts 1, 63, 76 and 78 of the Commission's Rules and Regulations ARE AMENDED as set forth in the attached Appendix B. Pursuant to the requirements of Section 623(b)(1) of the Cable Communications Policy Act of 1984 and the authority contained in the Administrative Procedure Act, 5 U.S.C. § 553(d)(3), these rules and regulations ARE EFFECTIVE April 28, 1985.

146. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

List of Commenters

Initial Comments

1. Aberdeen, SD
2. Adams-Russell Cable Services Division of Adams-Russell, Caribbean Communications Corporation, Joseph S. Gans, Inc., Jones Intercable, Inc., Mid-Coast Cable Television, Inc., Multivision Northwest, Inc., Muncy TV Corporation, Satellite Syndicated Systems Cable Television of Southwest, Inc., and Service Electric Cable TV, Inc.
3. Addison, IL
4. American Civil Liberties Union
5. American Council of Life Insurance
6. Association of Independent Television Stations, Inc.
7. Association of Maximum Service Telecasters, Inc.
8. Athens, OH
9. Austin Satellite Television, Inc., Cablecom Corporation and Cable Dallas, Inc.
10. Austin, TX
11. BellSouth Corporation
12. Booth American Company
13. CBS Inc.
14. 105 Cable Operators
15. Cable Television Access Coalition, Inc.
16. Cable Television Information Center
17. Cable World, Inc.
18. California Cable Television Association
19. California Department of Consumer Affairs
20. Capital Cities Cable, Inc.

21. Carbondale, IL
22. Casco Cable Television, Inc. and Casco Cable Television of Bath, Maine
23. Catawba County, NC
24. Cellular Telecommunications Division of Telocator Network of America, Inc.
25. Centel Communications Company
26. Mayor and Council of Chestertown, MD
27. Gary L. Christensen
28. City Club of New York
29. Clarks Telephone Company, Delta County Tele-Comm. Inc., Ducor Telephone Company, Eastern Nebraska Telephone Company, Golden West Telephone Cooperative, Inc., Northwest Telephone Company, The Orwell Telephone Company and the Volcano Telephone Company
30. Clearwater Communications, Inc.
31. Communications Workers of America
32. Community Antenna Television Association
33. Connecticut Department of Public Utility Control
34. Contra Costa County, CA, Public Works Department
35. Consumers Power Company
36. Corporation for Public Broadcasting
37. Cox Cable Communications, Inc.
38. Cumberland, MD
39. Department of Justice
40. Detroit Edison
41. Direct Satellite Communications, Inc.
42. District of Columbia, Office of Cable Television
43. Dubuque, IA, Cable Regulatory Commission
44. Eagle Telecommunications, Inc./Colorado

45. Eastern Shore Association of Municipalities
46. Elmwood Park Cable Commission
47. Farrow, Schildhause, Wilson & Rains
48. Florida Cable Television Association, Inc.
49. Florida League of Cities
50. GTE Service Corporation
51. Gill Industries
52. Guam Cable TV and Northern Marianas Cable TV Corporation
53. Hallandale, FL
54. Heritage Communications, Inc.
55. Hogan & Hartson for Cable Operators and State Cable Associations
56. Hughes Aircraft Company, Microwave Communications Products
57. Huntsville, AL
58. Indianapolis, IN
59. Inkster, MI
60. Islip, NY
61. Joint Cable Operators
62. Keene, NH
63. Kentucky Educational Television Authority
64. Mayor, Longview, TX
65. Los Angeles, CA
66. Louisiana Community Cablevision, Ltd.
67. Luke, MD
68. Major League Baseball
69. Mankato, MN
70. Marsh Media, Ltd.
71. Marshall, MN

72. Maryland Municipal League
73. Metro Companies
74. Metro Mobile CTS, Inc.
75. Miami Cablevision
76. Michigan Cable Television Association
77. Mid-America Cable Television Association, Kansas CATV Association, Nebraska Cable Communications Association and Missouri Cable Television Association
78. Montana Cable Television Association
79. Monticello, NY
80. Morality in Media
81. Morganton, NC
82. Motion Picture Association of America, Inc.
83. Municipal Coalition
84. National Association of Broadcasters
85. National Association of State Cable Agencies
86. National Association of Towns and Townships
87. National Basketball Association, National Hockey League, North American Soccer League and Major Indoor Soccer League
88. National Broadcasting Company, Inc.
89. National Cable Television Association, Inc. and the Community Antenna Television Association
90. National Federation of Local Cable Programmers
91. National League of Cities
92. National Telecommunications and Information Administration
93. National Telephone Cooperative Association
94. New England Cable Television Association, Inc.
95. New Hartford, NY

96. New Jersey Board of Public Utilities
97. New Jersey Cable Television Association
98. New York Citizens' Committee for Responsible Media
99. City of New York
100. New York Telephone Company and New England Telephone and Telegraph Company
101. North Area Cable Television Authority
102. North Carolina Cable Television Association
103. Omaha, NE
104. County of Orange, CA
105. Oregon Cable Communications Association
106. Pacific Bell and Nevada Bell
107. Pennsylvania Cable Television Association
108. Private Cable Systems, Inc.
109. Redmond, WA
110. Richey Cable, Inc.
111. Rochester, MN
112. Romulus, MI
113. St. Joseph, MI
114. St. Louis, MO
115. San Diego, CA
116. Cable Television of Greater San Juan, Inc.
117. Santa Barbara, CA
118. Santa Cruz, CA
119. Scottsdale, AZ
120. Southern Cablevision of Corbin, Inc. and Ayco Cable, Ltd.
121. Southwestern Bell Telephone Company
122. Southwestern Oakland Cable Commission

123. SPACE (The Satellite Television Industry Association)
124. Storer Communications, Incorporated
125. Sweetwater, FL
126. Taconic Telephone Company
127. Tele-Communications, Inc.
128. Telephone and Data Systems, Inc., and TDS Cable Communications Company
129. Troy, MI
130. United Church of Christ, Office of Telecommunication
131. United States Conference of Mayors
132. United States Telephone Association
133. Various Cable Television Interests
134. Vermont Department of Public Service
135. Viacom International Inc.
136. Western Communications, Inc.
137. Mayor and Commissioners, Westernport, MD
138. Winona, MN
139. Wyoming Association of Municipalities
140. Yukon, OK

Reply Comments

1. Adams-Russell Cable Services Division of Adams-Russell, Caribbean Communications Corporation, Joseph S. Gans, Inc., Jones Intercable, Inc., Mid-Coast Cable Television, Inc., Multivision Northwest, Inc., Muncy TV Corporation, Satellite Syndicated Systems Cable Television of Southwest, Inc., and Service Electric Cable TV, Inc.
2. Ameritech Operating Companies
3. Anchorage Telephone Utility
4. Association of Independent Television Stations, Inc.

5. Association of Maximum Service Telecasters, Inc. and National Association of Broadcasters
6. Austin Satellite Television, Inc., Cablecom Corporation and Cable Dallas, Inc.
7. BellSouth Corporation
8. Boston, MA
9. 105 Cable Operators
10. California Cable Television Association
11. Capital Cities Cable, Inc.
12. Carolina Beach, NC
13. Casco Cable Television, Inc., and Casco Cable Television of Bath, Maine
14. Communications Workers of America
15. Cox Cable Communications, Inc.
16. Department of Defense
17. Department of Justice
18. Direct Satellite Communications, Inc.
19. Eagle Telecommunications, Inc./Colorado
20. Florida Cable Television Association, Inc.
21. GTE Service Corporation
22. Gill Industries
23. Guam Cable TV and Northern Marianas Cable TV Corporation
24. State of Hawaii
25. Heritage Communications, Inc.
26. Hogan & Hartson for Cable Operators and State Cable Associations
27. Joint Cable Operators
28. Marsh Media, Ltd
29. Media General Cable of Fairfax County, Inc.

30. Miami Cablevision
31. Michigan Cable Television Association
32. Mid-America Cable Television Association, Kansas CATV Association, Nebraska Cable Communications Association and Missouri Cable Television Association
33. Mid-America Capital Resources, Inc.
34. Morganton, NC
35. National Association of State Cable Agencies
36. National Cable Television Association, Inc. and the Community Antenna Television Association
37. National League of Cities
38. National Telecommunications and Information Administration
39. National Telephone Cooperative Association
40. New England Cable Television Association
41. New York Citizens' Committee for Responsible Media
42. City of New York
43. New York Telephone Company and New England Telephone and Telegraph Company
44. North Carolina Cable Television Association
45. Oxford Development Corporation
46. Pacific Bell and Nevada Bell
47. Pennsylvania Cable Television Association
48. Rogers U.S. Cablesystems, Inc.
49. Cable Television of Greater San Juan, Inc.
50. Signal Master, Inc.
51. SPACE (The Satellite Television Industry Association)
52. Tele-Communications, Inc.
53. Telecommunications Research and Action Center

54. Telecommunications Research and Action Center, Henry Geller and Donna Lampert
55. Telephone and Data Systems, Inc., and TDS Cable Communications Company
56. Texas Power and Light Company, Alabama Power Company, Mississippi Power and Light Company and South Carolina Electric and Gas Company
57. Time Incorporated
58. United States Catholic Conference
59. United States Conference of Mayors
60. United States Telephone Association
61. Various Cable Television Interests
62. Waitfield Cable, Ardmore Data and Broadband Services, Inc., Elkhart Cable Co, Cross Cable Television, Moultrie Telecommunications, Inc., Citizens Telephone Corp. and United Communications Association, Inc.
63. Western Communications, Inc.

APPENDIX B

Parts 1, 63, 76, and 78 of Chapter I of Title 47 of the Code of Federal Regulations are proposed to be amended to read as follows:

A. Part 1—Practice and Procedure.

1. Section 1.1414 is amended by revising paragraphs (a)(1) and (a)(2) and adding new paragraphs (a)(3) and (e) to read as follows:

1.1414 State certification.

(a) If the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

* * * * *

(e) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) within 180 days after the complaint is filed with the state, or

(2) within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

B. Part 63—Extension of Lines and Discontinuance of Service by Carriers.

1. The Table of Contents of Part 63 is amended by adding in the proper sequence the following heading for new § 63.09 and by revising the references to § 63.54 and § 63.57 to read as follows:

§ 63.09 Special provisions relating to projects under § 63.58.

* * * * *

§ 63.54 Facilities for provision of video programming by a telephone common carrier in its telephone service area.

* * * * *

§ 63.57 Availability of pole (conduit) rights to cable operators.

* * * * *

2. Section 63.01(r) is deleted and removed.

3. A new Section 63.09 is added to read as follows:

§ 63.09 Special provisions relating to projects under § 63.58.

(a) Applications of telephone common carriers proposing to construct and operate or acquire and operate systems providing video programming in rural areas within their telephone service areas either directly or indirectly through affiliates pursuant to § 63.58 need submit only the following information in lieu of that required by § 63.01:

(1) Applicant's name, address and telephone number. This information shall also be submitted for Applicant's affiliate, if applicable;

(2) Whether Applicant or its affiliate will construct, own and operate, or acquire and operate, the cable system;

(3) Location of the proposed system (city, town or village, county, and state);

(4) Certification that the area proposed for service is rural as defined in § 3.58, and as derived from the most recently published statistics of the U.S. Department of Commerce, Bureau of the Census;

(5) Certification that Applicant is franchised to provide the service pursuant to Title VI of the Communications Act, and date of franchise; and

(b) An original and two copies of the application shall be furnished to the Secretary, Federal Communications Commission, Washington, DC 20554. Applicant shall furnish a copy to the Governor of the state in which the line is to be constructed or acquired, and also to the Secretary of Defense, Attn. Special Assistant for Telecommunications, Pentagon, Washington, DC 20301.

4. Section 63.54 is amended by revising paragraphs (a) and (b) to read as follows:

§ 63.54 Facilities for provision of video programming by a telephone common carrier in it telephone service area.

(a) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall engage in the provision of video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.

(b) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provision of video programming to the viewing public in the telephone service area of the telephone common carrier.

5. Section 63.55 is amended to read as follows:

§ 63.55 Affiliation showings.

Except as provided for in § 63.56, applications by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable systems in their service areas shall include a showing that the applicant is unrelated and unaffiliated, directly or indirectly, with the proposed cable operator.

6. Section 63.56 is amended by revising paragraphs (a), (b), (c), (d) and (e) to read as follows:

§ 63.56 Waivers.

(a) In those areas where the provision of video programming to the viewing public demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause, the provisions of §§ 63.54 and 63.55 may be waived, on the Commission's own motion or on petition for waiver, if the Commission finds that the public interest, convenience and necessity would be served thereby.

(b) Telephone company waiver requests may enjoy a rebuttable evidentiary presumption to the effect that cable service could not presently exist except through a cable system operated by, controlled by, or affiliated with the local telephone common carrier, if the waiver request includes:

(1) * * *

(2) A demonstration that the proposed service area has a density of less than thirty households per route mile of coaxial cable trunk and feeder line;

(3) Evidence that notice was given by newspaper advertisement(s) or other appropriate means, of waiver petitioner's intention to construct and/or operate the proposed cable system, including the name of the newspaper, the date(s) of the advertisement(s) and the area in which the newspaper is distributed; and

(4) * * *

(c) Telephone company waiver requests shall not enjoy the rebuttable evidentiary presumption of paragraph (b) of this section, and shall contain the showings required by the Commission, including notice as specified in § 63.56(b)(3), if the proposed service area has a density of thirty or more households per route mile of coaxial cable trunk and feeder line.

(d) Interested persons may submit comments on, or oppositions to, the petition for waiver within thirty days after the Commission gives public notice that the petition has been filed. Upon good cause shown in the petition for waiver, the Commission may specify a shorter time for such submission. Comments or oppositions shall be served upon the petitioner, and shall contain a complete and detailed showing, supported by affidavit, of any facts or considerations relied upon. An opposition may seek to rebut the evidentiary presumption of paragraph (b) of this section by showing that:

(1) The density of the area to be served is thirty or more households per route mile; or

(2) The opposing party has a present intention to offer nonaffiliated cable service.

Evidence in support of the showing in paragraph (d)(1) of this section must be submitted within the public notice period. Evidence in support of the showing in paragraph (d)(2) of this section must be submitted within the public notice period unless an extension of time requested within that period is granted for good cause shown; evidence must include financial, technical, and other data sufficient to show the opposing party's ability to institute essentially the same service to approximately the same number of households within the same time frame as proposed by the waiver petitioner. Extensions will generally not be granted for a period to exceed thirty days.

(e) The petitioner may file a reply to the comments, or oppositions, within thirty days after their submission, and shall serve copies upon all persons who have filed pleadings.

* * * * *

7. Section 63.57 is amended to read as follows:

§ 63.57 Availability of pole (conduit) rights to cable operators.

Applications by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable systems shall include a showing (in addition to the conditions set forth in the above sections) that the independent cable system proposed to be served had available, at its option, and within the limitations of technical feasibility, pole attachment rights (or conduit space, as the case may be) at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator. This availability must exist not only at the time of the authorization but also prior to the operator's decision to seek an award of a local franchise, if such is required, and such policy of the applicant must be made known to the local franchising authority. Separate documents, attesting to the above conditions, by the cable operator and, where applicable,

by the appropriate local franchising authority must be annexed to the application.

8. Section 63.58 is amended by revising paragraph (a) and the note to read as follows:

§ 63.58 Exemption.

(a) A telephone common carrier shall be exempt from the provisions of §§ 63.54 through 63.56 if the proposed service area contains none of the following:

* * * * *

NOTE: The Census Bureau has defined some incorporated places of 2,500 inhabitants or more as "extended cities." Such cities consist of an urban part and a rural part. If the proposed service area includes a rural part of an extended city, but otherwise includes no territory described in paragraph (a)(1), (2) or (3) of this section, an exemption shall apply.

* * * * *

C. Part 76—Cable Television Service.

1. Section 76.5 is amended by revising paragraphs (a) and (11); by adding new paragraphs (ii), (jj), and (kk) (presently marked (ii)-(kk) [Reserved]); by adding new paragraphs (oo), and (pp); and by designating the existing Note to paragraph (a) as Note (1) and adding a new Note (2) to read as follows:

§ 76.5 Definitions.

(a) *Cable system or cable television system.* A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) a facility that serves only subscribers in one or more multiple unit dwellings under common own-

ership, control or management, unless such facility or facilities uses any public right-of-way; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or (4) any facilities of any electric utility used solely for operating its electric utility systems.

Note 1: * * *

Note 2: The provisions of Subpart D and F shall also apply to all facilities defined previously as cable systems on or before April 28, 1985.

* * * * *

(ii) *Affiliate.* When used in relation to any person, another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

(jj) *Person.* An individual, partnership, association, joint stock company, trust, corporation, or governmental entity.

(kk) *Significant interest.* A cognizable interest for attributing interests in broadcast, cable, and newspaper properties pursuant to Sections 73.3555, 73.3615, and 76.501.

(ll) *Cable system operator or operator.* Any person or group of persons (1) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system; or (2) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

* * * * *

(oo) *Cable service.* The one-way transmission to subscribers of video programming. or other programming service; and, subscriber interaction, if any, which is re-

quired for the selection of such video programming or other programming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.

(pp) *Basic cable service.* For the purposes of regulating rates of cable systems found not to be subject to effective competition, basic cable service is the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast television signals as defined in §§ 76.55 to 76.61 of the rules [or, in the absence of at least three must-carry signals, any unaltered broadcast television signals] and the public, educational and governmental channels, if required by a franchising authority under Title VI of the Communications Act.

2. A new Section 76.10 is added to read as follows:

§ 76.10 Channel access enforcement.

(a) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available in accordance with the provisions of Title VI of the Communications Act may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available.

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available in accordance with the provisions of Title VI of the Communications Act may petition the Commission for relief upon a showing of three prior adjudicated violations. Records of previous adjudications resulting in a court determination that the operator has violated the provisions of the Communications Act concerning commercial channel access shall be considered as sufficient for the showing necessary under this section.

(c) Petitions filed with the Commission in response to paragraph (b) shall be made in accordance with the provisions and procedures set forth in Section 76.7 for petitions for special relief.

3. A new Section 76.11 is added to read as follows:

§ 76.11 Lockbox enforcement.

Any party aggrieved by the failure or refusal of a cable operator to provide a lockbox as provided for in Title VI of the Communications Act may petition the Commission for relief in accordance with the provisions and procedures set forth in Section 76.7 for petitions for special relief.

4. Section 76.30 is deleted and removed.

5. Section 76.31 is deleted and removed.

6. A new Section 76.33 is added to read as follows:

§ 76.33 Standards for rate regulation.

(a) A franchising authority may regulate the rates of a cable system granted a franchise after December 29, 1984, and any cable system after December 29, 1986, subject to the following conditions:

(1) Only basic cable service as defined in § 76.5(pp) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to have effective competition whenever at least three unduplicated signals serve the cable community. Signals shall be counted if they place a Grade B contour (as defined in Section 73.683 of our rules) over any portion of the cable community, are significantly viewed within the cable community (as defined by Section 76.54 of our rules) or are translator stations located within the cable community, provided that the translators are not used to retransmit stations already providing

Grade B contour or significantly viewed signals within the cable community. The Commission may grant exceptions to this standard where the franchising authority demonstrates with engineering studies in accordance with Section 73.686 of the Commission's rules and other showings that such signals are not in fact available within the community.

(3) A cable system once determined to be subject to effective competition shall not be subject to regulation for one year after any change in market conditions which would cause it to be determined not to be subject to effective competition.

(4) A cable system may automatically pass through to the basic service rate without franchising authority approval cost increases that are readily identifiable and entirely attributable to the provision of basic service. Rate increases of this type may be taken in addition to the automatic 5% annual rate increase to which the cable system may be entitled under the Title VI of the Communications Act.

(b) For franchises granted on or before December 29, 1984, a franchising authority may, until December 29, 1986, to the extent provided in the franchise agreement:

(1) Regulate the rates for the provision of basic cable service;

(2) Require the provision of any tier of service without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); and

(3) Regulate the rates for the initial installation or the rental of one set of the minimum equipment necessary to receive basic cable service.

(c) Any state or local law in existence on December 29, 1984, which limits or preempts regulation of rates for cable service by any franchising authority shall remain in effect until December 29, 1986, to the extent that it provides for such limitation or preemption.

(d) In establishing any rate for the provision of basic cable service by cable systems subject to paragraph (a) of this section, the franchising authority shall: (1) give formal notice to the public; (2) provide an opportunity for interested parties to make their views known, at least through written submissions; and (3) make a formal statement (including summary explanation) when a decision on a rate matter is made.

7. Section 76.215 is deleted and removed.

D. Part 78—Cable Television Relay Service.

1. Section 78.13 is amended by adding a note to read as follows:

§ 78.13 Eligibility for license.

* * * * *

Note: The provisions of this section shall apply to any facility holding a license or other authorization on or before April 28, 1985.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984	MM Docket No. 84-1296

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: May 30, 1986; Released: June 5, 1986

BY THE COMMISSION

Introduction

1. On April 11, 1985, the Commission adopted a *Report and Order* in MM Docket No. 84-1296, (*Report and Order*), 50 FR 18637, that amended its rules to implement certain provisions of the Cable Communications Policy Act of 1984 (Cable Act). Before the Commission are three Petitions for Partial Reconsideration of the *Report and Order.* These petitions seek reconsideration of the Commission's policy decisions in two areas: 1) franchise fees; and

2) the definition of "cable system." Also before the Commission are comments filed in response to its *Order Reopening the Period for Filing Comments* in MM Docket No. 84-1296 (*Order*), 50 FR 38016. This *Order* was issued to provide interested parties an opportunity to comment on the impact of the U.S. Court of Appeals decision in *Qunicy Cable TV, Inc. v. FCC* (*Qunicy*) on the definition of "basic cable service" adopted in the *Report and Order*.[1]

2. By this *Memorandum Opinion and Order*, we are denying the Petitions for Partial Reconsideration of the *Report and Order*. We are also adopting a revised definition of "basic cable service" that eliminates references to the must carry rules.

Discussion

3. On October 30, 1984, the Cable Communications Policy Act of 1984 was signed into law.[2] This legislation amends the Communications Act of 1934 by adding a new Title VI, entitled "Cable Communications." The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve.[3] In the *Report and Order*, the Commission amended its rules in order to comply with several provisions of the Cable Act.

4. Petitions for Partial Reconsideration were filed by Miami Cablevision (Miami CATV), the National Association of Broadcasters (NAB), and the Association of Maximum Service Telecasters (MST). Miami CATV seeks reconsideration of the Commission's decision to delete the franchise fee standards from the rules and its related refusal to reinstate petitions concerning franchise fee disputes that were pending prior to the effective date of the Cable Act. The NAB and MST each request that the Commission revise the definition of a "cable system" adopted in the *Report and Order*. As indicated in the *Order*, we also believe it necessary to consider modifications to the definition of "basic cable service" adopted in the *Report and Order* to reflect the

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[1] In the *Quincy* decision, the Court ruled that the Commission's mandatory signal carriage ("must carry") rules for cable television systems are invalid under the Constitution of the United States. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).

[2] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 1 *et seq.*, 98 Stat. 2779 (1984).

[3] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (hereinafter House Report).

Qunicy decision. These issues will be addressed in turn.

5. *Franchise Fees.* Section 622 of the Cable Act specifies that the franchise fees paid by the cable operator to the franchising authority shall be no more than five percent of gross revenue. In addition, Section 622(i) provides that "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."

6. In the *Report and Order*, the Commission concluded that these statutory provisions rendered Section 76.31 of its rules concerning franchise fee limits invalid. On this basis, the Commission deleted Section 76.31.[4] The Commission held that Section 622 of the Cable Act "spells out quite clearly the terms of the franchise fee and how it is to be administered" and that, therefore, "there is no need for us to further define this matter." The Commission further stated that it believed any disputes involving franchise fee matters are best resolved through the courts. In concert with this decision, the Commission declined to reinstate petitions concerning franchise fee disputes under Section 76.31 of its rules that were pending prior to December 29, 1984, the effective date of the Cable Act. The Commission indicated that it no longer had a regulatory interest in resolving petitions involving policy matters that were rendered moot by the Cable Act.

7. Miami CATV requests that the Commission amend, rather than delete, its rules regarding franchise fee standards. In this respect, Miami CATV asks the Commission to adopt rules that provide for interpretation of various aspects associated with franchise fees that are raised in the Cable Act. More specifically, Miami CATV requests that the rules address subjects that include: 1) determinations of whether certain kinds of payments are franchise fees within the meaning of Section 622 (g)(1); 2) whether a given fee exceeds five percent; 3) what type of "tax, fee, or assessment" is "unduly discriminatory" against cable operators per Section 622(g)(2)(C); 4) with respect to new fran-

[4] Section 76.31 of the Commission's rules formerly limited franchise fees to three percent of a cable system's gross revenues, with provision for obtaining a five percent fee upon submission to the Commission of a showing of reasonableness. This rule also contained suggested, but not mandatory, guidelines for the local franchising process. The Commission found that these provisions were generally addressed by Section 621 and other sections of the Cable Act. The Commission also deleted Section 76.30 of its rules which provided that the franchise fee limits in Section 76.31 were applicable only to cable systems with more than 1000 subscribers.

chises, whether or to what extent are capital costs exempt from inclusion as part of the franchise fee; 5) with respect to new franchises, whether or to what extent are various payments exempt from inclusion as part of the franchise fee; and 6) the retroactive application of various provisions of the Cable Act. It also requests that the Commission reinstate the petitions regarding franchise fee disputes that were pending prior to December 29, 1984. The National Cable Television Association, Inc. (NCTA) filed comments in support of Miami CATV's petition for reconsideration. The National League of Cities (NLC), the City of Miami (Miami), and New York City (NYC) filed in opposition.

8. In its petition, Miami CATV argues that by not promulgating amendatory replacement provisions for our franchise fee rules, the Commission has abdicated its statutory authority and contravened the letter of Section 622 of the Cable Act and the intent of Congress. It argues that since the Cable Act is remedial in nature, the Commission is required to take a liberal interpretation of its provisions. Miami CATV further contends that "in not recognizing the possibility of a legitimate need for initial supervision of the many aspects of franchise fees not precluded by Section 622(i), the Commission has ignored its responsibility regarding the Section 622(i) exception." Thus, Miami CATV asserts, the Commission has rendered functionless the phrase "except as provided in this section" and, therefore, has violated a cardinal rule of statutory construction, i.e., that a legislature is presumed to have used no superfluous words. Miami CATV also states that implementation of Section 622 is mandatory, not permissive. This is so, it argues, because the underlying congressional intent requires that the permissive word "may" in Section 622(i) be construed as mandatory.[5] Finally, Miami CATV claims that to render moot petitions pending under prior law is to impermissibly adopt a general retroactive application of the Cable Act's franchise fee provisions.[6]

9. NCTA supports Miami CATV's position that the Commission should amend, rather than delete, its franchise fee rules. It argues, by way of comparison, that the Commission adopted rules to ensure that the lockbox provisions of Section 624 of the Cable Act are carried out even though that section did not specifically

[5] Section 622(i) of he Cable Act provides that "[a]ny Federal agency may not regulate the amount of the franchise fee paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."

[6] At the time it filed its reconsideration petition, Miami CATV was seeking a ruling from the Commission concerning franchise fees relating to its system in Miami, Florida. It subsequently withdrew that petition.

require the Commission to play a role in its implementation or enforcement. NCTA notes that the Commission went so far as to adopt special relief provisions for disputes arising out of Section 624, yet it left disputes arising from Section 622 to be resolved by the courts. NCTA states that if these matters are left to the courts, there are likely to be disparate and inconsistent rulings which would frustrate the congressional intent to provide the industry with the certainty and stability it needs.

10. In opposition, NLC contends that the legislative history does not provide support for Miami CATV's interpretation of the applicability of the Section 622(i) exception. It submits that the requirement for a liberal interpretation of a statute that Miami CATV cites is applicable primarily in cases in which broad regulatory programs have been deemed essential for the public welfare. NLC contends that Miami CATV has made no showing that a regulatory program for franchise fees is essential for the public welfare. NLC and NYC point out that Section 622 does not include provisions which authorize the regulation of franchise fees. They state that, in fact, Section 622 clearly contemplates enforcement of its provisions by the courts. In this respect, NLC and NYC observe that Section 622(d) allocates the burden of proof in court actions involving the pass through of increases in franchise fees to subscribers.

11. Regarding reinstatement of prior petitions involving franchise fees, Miami contends that there is no justification for continuing to apply any of the Commission's past policies that would be inconsistent with the standards of the Cable Act. Miami further argues that to apply such past policies at this late date would contravene the Cable Act's fundamental objective of establishing clear standards to govern the relationships between franchising authorities and cable operators.

12. We are not persuaded that our decision to eliminate the franchise fee provisions from our rules should be modified. The provisions of Section 622 of the Cable Act supersede our franchise fee rules and, as we noted in the *Report and Order*, the House Report states that "[t]he current FCC regulations which restrict the use of franchise fee revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the term of this legislation." Additionally, the Cable Act in Section 621, General Franchise Requirements, and Section 626, Renewal, provide standards for the local franchising process. Thus, the Cable Act has displaced Section 76.31 of our

rules and replaced it with specific statutory provisions.

13. Turning to the question of continued jurisdiction over those franchise fee issues not covered by former Section 76.31 of our rules, we believe that Congress intended and anticipated that enforcement of the franchise fee provisions and adjudication of disputes thereunder would be administered in substantial part, through the jurisdiction of the courts. The FCC continues to have jurisdiction in this area. Section 1 of the Communications Act provides that the Commission shall "execute and enforce the provisions of [the] Act." This mandate must, however, be read in conjunction with the more specific provisions of the Act and with due regard for the divisions of responsibility for enforcement and interpretation that Congress specified in both the specific words of those amendments to the Act adopted in the Cable Act and in the legislative history of those amendments. That authority was divided, sometimes explicitly and sometimes implicitly, between the Commission, the U.S. Department of Justice, the federal courts, the state courts, the states, and the municipal franchising authorities. Issues relating to cable franchise fees had been regulated by Commission rule prior to the adoption of the Cable Act with considerable resulting controversy.

14. The course of the legislative process suggests to us that Congress intended through the Cable Act to both resolve the basic substantive issue of the permissible fee level and withdraw this matter from controversy before the Commission. Although the allocation of responsibility under this Section is not as specific as might ideally be desired, it does reference court actions under its particular subsections. (*See* Section 622(d)). This reference is in sharp contrast to other provisions of the Cable Act, where the Commission's primary and often exclusive role in adjunction and enforcement are delineated. These include access grievances (47 U.S.C. § 532(e)); cross-ownership questions (id., §§ 533(b), (c)); rate regulation (id., § 543(b), (h)); and equal employment opportunity (id., § 554).

15. Limiting our exercise of jurisdiction in this manner also comports with the legislative history to Section 622. S.2172 (97th Congress), a predecessor bill to the one finally adopted, provided the Commission with explicit authority and responsibility for the regulation of franchise fees. In testimony before the Senate Subcommittee on Communications on April 26, 1982, the Chairman of the FCC noted that there was a rulemaking proceeding in progress before the Commission in which deletion of the existing rule was being proposed and urged "if there is a Congressional

desire to continue rules in this area, the legislation should retain its present explicit grant of authority to the Commission." The legislation finally passed, however, contained no such explicit authority. Indeed, the House Report (p. 65) states: "Subsection 622(i) prohibits any agency of the United States, including the FCC, from regulating the amount of the franchise fee or the use to which the funds collected through the fee will be put. The current FCC regulations which restrict the use of franchise fee revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the terms of this legislation.

16. Given the location of the fee limit in the Communications Act and our perception that Congress intended disputes over fees be judicially resolved, it appears to us that such jurisdiction as may remain in the agency was to be exercised at best concurrently with the judiciary. It is our opinion that judicial decision making in this area is both superior and preferred. This is, for example, the manner in which existing Section 605 of the Act has historically been enforced. We believe that the comparison NCTA makes to the Commission's decision to adjudicate disputes arising over the lockbox requirements of Section 624 is inappropriate. In this respect, we observe that there is no reference in this section explicitly giving the courts jurisdiction to enforce the lockbox requirements. In addition, Section 624 specifically contemplates that the Commission may find it necessary to establish technical standards relating to facilities and equipment required by the franchising authority pursuant to a franchise agreement.

17. Miami CATV, in urging continued Commission adjudicatory responsibility, quotes from the Committee cost estimate in the House Report indicating that a portion of the one million dollar cost to the FCC of implementing the Cable Act is attributable to the FCC's "continuing responsibilities . . . including enforcement of . . . franchise fee limits." House Report, p. 38. As noted below, the FCC will continue to entertain certain fee disputes that bear directly on our expertise in telecommunications, a very limited range of cases we believe. In further considering this point, we note that the Congressional Budget Office estimate that accompanies the Committee cost estimate and provides more detailed discussion of the Commission's continuing responsibilities does not mention administrative, adjudicative, or any other form activity with respect to franchise fees. We believe that the House Report's reference to franchise fees is illustrative of the types of expenditure which we might incur rather than a substantive

determination of the breadth of the FCC's role over fees.

18. Accordingly, given our recognition of the concurrent judicial and FCC jurisdiction over disputes involving Section 622, we will continue to entertain disputes only involving matters that directly impinge on a "national policy concerning cable communications" (47 U.S.C. § 541(1)) that call upon our expertise and we direct parties to resort to courts to decide all other matters. Guidance in this area can be drawn from subsection (g) of Section 622, which indicates the range of definitional disputes that may arise under the definition of franchise fee. Thus, disputes involving whether a particular levy by a state is an impermissible franchise fee disguised as a tax (see 47 U.S.C. §§ 542(g)(1), (2)(A)), payments made under the Copyright Act (id., § 542(g)(2)(E)), incidental payments made under terms of the franchise (id., § 542(g)(2)(D)) or challenges to the constitutionality of a particular fee will be directed to courts, whose jurisdiction is established by the Act.

19. On the other hand, the Commission will entertain fee disputes concerning matters that arise directly under specific provisions of the Cable Act and that may call upon the expertise of the Commission for their interpretation. For example, we will entertain interpretations of the Cable Act involving whether costs incurred in connection with public, educational or governmental access facilties (id., § 542(g)(2)(C)-(D)) should count toward the statutory five percent fee limit. However, we recognize that concurrent jurisdiction would apply, and the particular facts of any given dispute might indicate that local courts would be the more suitable forum.

20. We find that this division of authority, in addition to comporting with the legislative history of the Act, also will serve the goals of administrative convenience and economy.[7] First, many of the matters that may arise under disputes involving Section 622 will call for evidentiary showings that involve testimony from individuals or the production of exhibits that are located in the franchise community. These considerations make local courts the most convenient forum except when particular Commission expertise is called into play.

21. Second, disputes that are likely to arise may not be resolved by simply making mathematical calculations to determine whether the statutory fee cap has been exceeded or through

[7] Disputes concerning franchise fees have been brought to the Commission in the form of declaratory ruling petitions. The Administrative Procedure Act, 5 U.S.C. § 554(e) specifically grants administrative agencies authority to act on such requests within their "sound discretion."

the application of any FCC expertise related to telecommunications regulation. The bulk of the fee disputes resolved by the FCC in the past related to whether a franchisor could gain the additional two percent above the previous three percent limit. These disputes involved whether the additional costs were cable-related. This type of FCC scrutiny is now forbidden to the FCC by the terms of the statute and the accompanying history. Those disputes that did not call for resolving the three percent limit questions involved matters that called for interpreting contract provisions and matters of local taxation. Federal involvement in local tax matters, as we have noted, is "among the most delicate arising out of a federal system," *Cable Television User Tax*, 50 FCC 2d 540, 543 (1974). We are therefore reluctant to exercise jurisdiction in areas where we possess no expertise and where the relevance of the dispute to a "national policy concerning cable communications" is slight. Disputes over particular contract terms fall into the same category.

22. Caution by federal authorities over local tax questions has been recognized elsewhere. The Tax Injunction Act, 28 U.S.C. § 1341, forbids federal courts to "enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." It has been suggested, as an argument for continued Commission involvement, that this Act might preclude resolution of cable franchise fee disputes in federal court and that a federal limit on cable fees ought not be left under the control of states. First, some fee disputes will not involve issues covered by the Tax Injunction Act; the jurisdiction of federal courts will thus be available. Further, the tax Injunction Act is specifically directed to taxes rather than fees. To the extent it is applicable to cable fees directly or by analogy, however, we believe this argument proves too much. It would be anomalous for Congress to preclude federal court involvement to preserve the authority of the state decision making machinery while simultaneously providing federal administrative agency authority over the same subject matter.

23. Third, beyond tax and contract dispute questions, we foresee that another area of dispute under Section 622 may relate to the constitutionality of particular fees. Such cases are generally associated with attempts to levy specific taxes or fees on media. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 757 (1983); *Erie Telecomms. v. City of Erie*, Cir. Act. No 85-185 (W.D. Pa). These matters are the special province of the judicial branch of government, not an agency

whose expertise is in the field of telecommuncations regulation.

24. Turning to those disputed fees arising prior to the Cable Act, we conclude that we should follow the same principles for exercising jurisdictional authority. In particular, we believe it wise to allow courts that decide the "tax or fee" status of state and local levies to decide the status of those levies regardless of whether they arose before or after the effective date of the Act. Restricting jurisdiction over these matters allows parties to obtain consistent treatment of identical fee disputes. Further, this consistent treatment for such disputes is supported by the legislative history of the Act. In the Senate's consideration of the law, an official "legislative history" was included in the Congressional Record (October 11, 1984 at S.14285) that includes the following:

> Any franchise in effect on the effect (sic) date of Title VI that provides for a franchise fee in an amount up to or in excess of the five percent limitation in section 622(b) (*with or without the need for action by any Federal agency*) shall be deemed to have lawfully required such fee, up to but not in excess of five percent . . . (emphasis added)

Congressman Dingell in the House, one of the principal legislators involved in the drafting and passage of the Act, also addressed the consequences of the legislation for fees in excess of the Commission's previous limit. He states, concerning fees that violated the Commission rules, that "Any franchise which contemplated franchise fees up to or in excess of 5 percent shall be deemed to have lawfuily required this fee, but not in excess of 5 percent." He goes on to state that:

> In cases where franchise fee payments have been discontinued on the basis of FCC rules, the franchise authority is entitled to the discontinued payments. In all cases regarding payment of fees prior to the effective date of this bill, it is the original intent of the parties to the franchise agreement concerning franchise fees that should prevail.

Congressional Record of October 11, 1985 at H. 12241.

These statements indicate that the Commission was not supposed to continue to attempt to achieve compliance with the rules it had adopted prior to the Cable Act after the Cable Act was adopted. Fees at least up to the limit specified in the Cable Act were to be permitted regardless of previous actions or rules of the Commission. Accordingly, we believe Congress's interest in having the FCC resolve past fee disputes was lessened, not strengthened, by the passage of the Act. Given our reasons for declining to decide

fee dispute cases not involving clearly delineated telecommunications matters prospectively, we see no reason to adopt a different policy for pre-Act disputes which involve essentially the same questions posed by the post-Act disputes. In particular, we decline to reinstate the petitions that were pending prior to December 29, 1984. We have paid particular attention to whether, under the guidelines set forth for determining when our involvement in resolving franchise fee disputes would seem helpful, we should change our position in regard to the two pre-December 29, 1984, petitions which are the subject of pending judicial review. *See Yakima Valley Cablevision, Inc. et. al, v. FCC*, D.C. Cir. Nos. 85-1464 and 85-1665. In our view, neither of those petitions, which were filed by Yakima Valley Cablevision and the Connecticut Cable Television Association, respectively, involve the type of questions where our expertise can usefully be brought to bear. We therefore adhere to our dismissal of those petitions.

25. *Cable System Definition.* Section 602(6) of the Cable Act defines a "cable system" as:

> " . . . a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . . "

This section also specifically excludes from the definition of a cable system, *inter alia*: 1) facilities that only retransmit the signals of broadcast television stations; and 2) facilities that only serve subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facilities use public rights-of-way.

26. In the *Report and Order*, the Commission adopted the definition of a cable system specified in the Cable Act to replace the definition in Section 76.5(a) of its rules. The Commission recognized that there were differences in the new definition and that formerly specified in the rules. In particular, the former rule defined cable system as a facility that distributes the signals of broadcast stations, whereas the new definition specifically excludes facilities that only retransmit broadcast signals. A second difference is that the former definition excluded systems with fewer than 50 subscribers. Finally, the former definition in the rules excluded all facilities serving multiple unit dwellings under common ownership, control or management. The new definition of a cable system includes such facilities if, and only if, they use public rights-of-way. When multiple unit dwellings are involved,

the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management.[8]

27. The Commission recognized that as a result of these definitional differences, many facilities that previously qualified as cable systems would no longer come under the new definition. These facilities, therefore, would no longer be subject to Federal policies such as must carry requirements and eligibility for cable antenna relay service (CARS) facilities licenses that apply to cable systems.[9] To alleviate the disruptive effects of this change, the Commission ruled that facilities subject to the must carry rules at the time of the *Report and Order* would continue to be subject to the must carry rules. The Commission also grandfathered CARS license eligibility for existing licensees of such stations.

28. NAB requests that the Commission amend its rules to provide that the implementation of the Cable Act does not affect the applicability of the must carry rules.[10] The NAB is concerned that the new definition has modified the applicability of the must carry rules in three respects: 1) cable systems that would otherwise choose not to carry any broadcast signals are now subject to the must carry rules; 2) cable facilities that only retransmit broadcast signals are now exempt from these rules; and, 3) cable facilities with less than 50 subscribers that were previously exempt are now subject to must carry requirements. It submits that Congress intended that the applicability of the must carry rules be unaffected by the implementation of the Cable Act. NAB states that this intent is expressed in Section 624(f)(2) of the Cable Act[11], and that the House Report emphasizes this intent by singling out and naming the must carry rules among those to remain unaffected by the new statute.[12]

29. MST expresses concerns similar to those of NAB. However, MST addresses only the issue that the new definition makes the must carry rules applicable to all cable facilities. It requests that

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[8] *See Report and Order* at para. 27.

[9] Under the expanded definition of a cable operator as discussed in paragraph nine of the *Report and Order* and incorporated in Section 76.5(ee)(2) of our rules, anyone who controls or is responsible for the management and operation of a cable system would also be eligible for a CARS license upon a proper showing of such management or operational authority.

[10] NAB suggests that this can be accomplished by adding a note to the must carry rules to indicate that these rules shall also apply to all facilities defined previously as cable systems on or before the date the *Report and Order* was adopted.

[11] *See* Cable Act, § 624(f)(2).

[12] *See* House Report, p. 70.

the definition of cable system be modified to make it clear that must carry requirements apply only to those systems that choose to carry at least one broadcast signal. It argues that the change in the applicability of the must carry rules was made without adequate notice and that such a policy determination was beyond the scope of this proceeding. MST also argues that the Cable Act specifically grandfathers the must carry rules. It further contends that the Commission's action on this issue has unexplored policy ramifications and possibly First Amendment and copyright implications.

30. Since the adoption of the *Report and Order* and the filing of the requests for reconsideration by NAB and MST, two major events affecting the must carry rules have occured. As indicated above, on July 19, 1985, the Court ruled the must carry rules constitutionally invalid in the *Quincy* decision. Hence, the Court vacated the must carry rules. Then, on November 14, 1985, the Commission adopted a combined *Notice of Inquiry and Notice of Proposed Rulemaking (Notice)* to request comments and proposals concerning mandatory signal carriage rules for cable systems in light of the *Quincy* decision.[13]

31. In view of these developments, we find that the issues with respect to the applicability of our former must carry rules raised by NAB and MST in their requests for reconsideration cannot be resolved here. Accordingly, we are denying the Petitions for Reconsideration filed by NAB and MST. However, to the extent that issues raised in these petitions may be relevant to any new rules that may be crafted by the Commission, they will be addressed in the context of the new proceeding on mandatory carriage of broadcast television signals by cable systems.

32. *Basic Cable Service.* Section 623 of the Cable Act requires that the Commission establish standards for the regulation of basic cable service rates by a franchising authority. The House Report encouraged the Commission to "fashion a definition of basic cable services most appropriate to achieve the purpose of the regulations."[14] With this mandate in mind, the Commission

[13] *See Notice of Inquiry and Notice of Proposed Rule Making* in MM Docket No. 85-349, 50 FR 48232 (1985).

[14] *See* House Report at 66. Section 602(2) of the Cable Act defines basic cable service as "any service tier which includes the transmission of local television broadcast signals." However, that defintion, as the House Report indicates, was intended for use in determining the extent of regulation permitted during the transition period set forth in Section 623(c).

determined that, for rate regulation purposes:

> Basic cable service is the tier of service regularly provided to all subscribers that includes the retransmission of all must carry broadcast television signals as defined in §§ 76.55 to 76.61 of the rules, [or, in the absence of at least three must carry signals, any unaltered broadcast television signals] and the public, educational and governmental channels, if required by a franchising authority under Section 611 of the Communications Act.[15]

33. On September 10, 1985, the Commission issued an *Order* reopening the proceeding in MM Docket No. 84-1296, to provide parties opportunity to comment on the impact of the *Quincy* decision to the definition of basic cable service adopted in the *Report and Order*. Thirteen parties filed comments in response to the *Order*.[16]

34. Many of the parties submitting comments state that only a technical change in the definition of basic cable service is necessary to accomodate the *Quincy* decision.[17] These parties agree that the reference to the must carry rules should be deleted, but differ regarding its replacement. NCTA, for example, states that the reference to the must carry rules should be revised to reflect that they are former rules. This could be accomplished, NCTA states, by replacing the must carry reference in the definition with the phrase "local broadcast television signals" and defining local signals as those signals that were entitled to mandatory carriage as of April 11, 1985.[18] Similarly, the National Telecommunications and Information Administration (NTIA) states that the Commission does not have to refer to the must carry rules in order to define basic cable service. It recommends, however, that basic cable service should be defined as the tier of cable service which includes the retransmission of any unaltered broadcast signal, meaning the signal as transmitted by the

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[15] *See Report and Order* para. 118.

[16] A number of parties commented on the appropriateness of the "effective competition" standard adopted in the *Report and Order*. (*See* the comments of the NLC, NYC, the National Association of State Cable Agencies, and the Satellite Television Industry Association, Inc.) We believe that the Commission's determination of the effective competition standard is unaffected by the *Quincy* decision. Inasmuch as the *Order* specifically requested that comments be limited to the definition of basic cable service, the Commission declines to respond to these comments.

[17] The NLC and NYC repeat their original position thay the Commission has no authority to alter, for rate regulation purposes, the definition of basic cable service as contained in Section 602(2) of the Cable Act.

[18] The State of New Jersey, Board of Public Utilities, Office of Cable Television; Heritage Communications, Inc.; and Centel Cable Television support this position.

broadcaster in its community of license.[19] American Television and Communications Corporation states that basic cable service should be defined as the lowest priced tier of service which includes transmission of all channels required under applicable law to be carried on the cable system. Finally, comments filed on behalf of cable operators by the law firm of Cole, Raywid and Braverman state that basic service should be defined as the tier of service regularly provided to all subscribers.

35. Several parties argue that the invalidation of the must carry rules necessitate a more fundamental change in the definition of basic service to maintain the *status quo* that prevailed after the adoption of the rules implementing the Cable Act. In this regard, the Cable Television Access Coalition, Inc. states that the *Quincy* decision eliminates all requirements for cable operators to provide local broadcast channels in any configuration or at any level of service. Similarly, NYC states that it is concerned that since there are no longer any must carry signals, the current definition of basic cable service as the tier of service which contains "all" such signals invites evasion of the regulatory scheme contemplated by the Cable Act. NYC argues that by deleting any signal that would have been subject to Sections 76.55 to 76.61 of the rules, a cable operator could remove even its lowest service tier from the Commission's present definition of basic cable service. As a possible solution to this problem, NCTA suggests that the definition of basic cable service be modified to permit franchising authorities to require rate regulated systems to co-locate any former must carry signals that the system carries on the lowest priced tier made available to all subscribers.

36. After reviewing the record, we believe that the *Quincy* decision creates only a minor technical problem with the definition of basic cable service. We believe that the invalidation of the must carry rules does not limit our ability to define basic cable service. We also conclude that the *Quincy* decision does not otherwise affect our original policy determination with respect to the definition of basic cable service. The reference to the must carry rules provided a simple reference to a group of broadcast signals carried by cable systems. These same signals can also be referenced by the characteristics that qualified them for must carry status. We believe that to do so would make no policy change in the definition of basic service. In this regard, we note that the definition of basic service required that these signals be

[19] The Community Antenna Television Association generally supports this position.

configured on a single tier. Thus, we do not agree with commenters who foresee instances of regulatory evasion developing. Accordingly, we are revising the definition of basic cable service contained in the *Report and Order* to eliminate the reference to the must carry rules and include new provisions that specify those signals that were previously afforded must carry status. The amendments for this modification are presented in the Appendix.

37. *Other Matters.* There are a few additional matters in the *Report and Order* that, while not specifically raised in any of the petitions, need some further clarification. In footnote 74 of the *Report and Order*, translator stations are to be included in the determination of signal availability for effective competition if they are "located" in the cable community. While translators are licensed to serve a community, they may in fact, because of topography, be located outside the town limits. It was our intention to count all such translators in the effective competition standard. We are making an appropriate change in the rules to reflect this clarification.

38. Additionally, in footnote 74 of the *Report and Order*, the discussion concerning the use of "significantly viewed in the cable community" as a criterion for determining whether a cable system faces effective competition addresses over-the-air availability of a signal in the cable community. The determination of whether or not a signal is significantly viewed in the cable community is based on Section 76.33 of our rules, which also references the provisions of Section 76.54 of the rules. Consequently, significantly viewed under Section 76.33 is defined in most cases in country-wide terms, although Section 76.54(b) permits the establishment of significantly viewed status on a cable system or community basis.[20]

Procedural Matters

39. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), it is certified that the final rule does not have a significant economic impact on a substantial number of small

[20] It should be noted that since the *Report and Order*, the Commission has set forth the procedures for demonstrating, in a waiver context, that a signal is no longer significantly viewed. *See* KCST, Inc., FCC 86-50 (released January 27, 1986). Paragraph 11 of this decision can be utilized by parties to show that a station is no longer significantly viewed in a community for effective competition purposes. In this connection, we are making an appropriate change in the rules to clarify the procedures parties may follow when filing petitions regarding the effective competition standard.

entities because no substantive changes have been made to the signal carriage rules.

40. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified forms, information collection and/or recordkeeping, labeling, disclosure or record retention requirements; and will not increase or decrease burden hours on the public.

41. Accordingly, IT IS ORDERED that the petitions for Partial Reconsideration of the Commission's *Report and Order* in MM docket No. 84-1296 filed by Miami Cablevision, the Association of Maximum Service Telecasters and the National Association of Broadcasters ARE DENIED. In addition, IT IS ORDERED that Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the Appendix, effective July 14, 1986. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 76.5 is amended by revising paragraph (ii) to read as follows:

§ 76.5 Definitions

* * * * *

(ii) *Basic cable service.* For the purposes of regulating the rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition, basic cable service is the tier of service regularly provided to all subscribers that includes the public, educational and governmental channels, if required by a franchising authority under Title VI of the Communications Act, and the retransmission of any broadcast television signals in the following categories:

(1) For communities located outside all major and smaller television markets (as defined in this section):

(i) television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;
(ii) television translator stations with 100 watts or higher power serving the community of the community unit and for community units that commence

operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit;
(iii) noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
(iv) commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(2) For communities in smaller television markets (as defined in this section):

(i) television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
(ii) noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;
(iii) commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;
(iv) television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt.-Plattsburgh, N.Y., television market);
(v) television translator stations with 100 watts or higher power serving the community of the community unit and, for community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit;
(vi) commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(3) For communities in major television markets (as defined in this section) and in communities located both wholly or partially within both major and smaller television markets:

(i) television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
(ii) noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;
(iii) television translator stations with 100 watts or higher power serving the community of the community unit and, for those community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit;
(iv) television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);
(v) commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(4) In the absence of at least three signals in one of the above categories, any unaltered broadcast television signals.

3. 47 CFR 76.33 is amended by revising paragraph (a)(2) and adding paragraph (e) to read as follows:

76.33 Standards for rate regulation

* * * * *

(a)(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to have effective competition whenever at least three unduplicated signals serve the cable community. Signals shall be counted if they place a Grade B contour (as defined in § 76.33 of our rules) over any portion of the cable community, are significantly viewed within the cable community (as defined by § 76.54 of our rules) or are translator stations licensed to serve the cable community, provided that the translators are not used to retransmit stations already providing Grade B contour or significantly viewed signals within the cable community. The Commission may grant exceptions to this standard where the franchising authority demonstrates with engineering studies in accordance with § 73.686 of the Commission's rules and other showings that such signals are not in fact available within the community.

* * * * *

(e) Any party may petition the Commission for relief of the provisions in this section in accordance with the provisions and procedures set forth in Section 76.7 for petitions for special relief.

* * * * *

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1666

AMERICAN CIVIL LIBERTIES UNION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,
DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GUAM CABLE TV,
GILL INDUSTRIES, INC., et al.,
ASSOCIATION OF INDEPENDENT TELEVISION
STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE
UNITED CHURCH OF CHRIST,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF
ADAMS-RUSSELL, et al.,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

CELLULAR TELECOMMUNICATIONS DIVISION OF
TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
NATIONAL LEAGUE OF CITIES,
CITY OF LOS ANGELES,
DEPARTMENT OF PUBLIC UTILITY CONTROL
OF THE STATE OF CONNECTICUT,
NATIONAL FEDERATION OF LOCAL
CABLE PROGRAMMERS, et al.,
CITY OF NEW YORK,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,
GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 85-1667

CABLE TELEVISION ACCESS COALITION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,
DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GUAM CABLE TV,
GILL INDUSTRIES, INC., et al.,

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF ADAMS-RUSSELL, et al.,
CELLULAR TELECOMMUNICATIONS DIVISION OF TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
NATIONAL LEAGUE OF CITIES,
CITY OF LOS ANGELES,
DEPARTMENT OF PUBLIC UTILITY CONTROL OF THE STATE OF CONNECTICUT,
NATIONAL FEDERATION OF LOCAL CABLE PROGRAMMERS, et al.,
CITY OF NEW YORK,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,
GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 85-1668

NATIONAL LEAGUE OF CITIES, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,
DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GUAM CABLE TV,
GILL INDUSTRIES, INC., et al.,
ASSOCIATION OF INDEPENDENT TELEVISION
STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE
UNITED CHURCH OF CHRIST,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF
ADAMS-RUSSELL, et al.,
CELLULAR TELECOMMUNICATIONS DIVISION OF
TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
CITY OF LOS ANGELES,
DEPARTMENT OF PUBLIC UTILITY CONTROL
OF THE STATE OF CONNECTICUT,
NATIONAL FEDERATION OF LOCAL
CABLE PROGRAMMERS, et al.,
CITY OF NEW YORK,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,
GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,

NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 85-1669

NATIONAL FEDERATION OF LOCAL CABLE
PROGRAMMERS, et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,
DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GUAM CABLE TV,
GILL INDUSTRIES, INC., et al.,
ASSOCIATION OF INDEPENDENT TELEVISION
STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE
UNITED CHURCH OF CHRIST,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF
ADAMS-RUSSELL, et al.,
CELLULAR TELECOMMUNICATIONS DIVISION OF
TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
NATIONAL LEAGUE OF CITIES,
CITY OF LOS ANGELES,

DEPARTMENT OF PUBLIC UTILITY CONTROL
OF THE STATE OF CONNECTICUT,
CITY OF NEW YORK,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,
GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 85-1670

CITY OF NEW YORK, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,
DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GUAM CABLE TV,
GILL INDUSTRIES, INC., et al.,
ASSOCIATION OF INDEPENDENT TELEVISION
STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE
UNITED CHURCH OF CHRIST,

NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF
ADAMS-RUSSELL, et al.,
CELLULAR TELECOMMUNICATIONS DIVISION OF
TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
NATIONAL LEAGUE OF CITIES,
CITY OF LOS ANGELES,
DEPARTMENT OF PUBLIC UTILITY CONTROL
OF THE STATE OF CONNECTICUT,
NATIONAL FEDERATION OF LOCAL
CABLE PROGRAMMERS, et al.,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,
GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 85-1671

GUAM CABLE TV, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,

DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GILL INDUSTRIES, INC., et al.,
ASSOCIATION OF INDEPENDENT TELEVISION
STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE
UNITED CHURCH OF CHRIST,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF
ADAMS-RUSSELL, et al.,
CELLULAR TELECOMMUNICATIONS DIVISION OF
TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
NATIONAL LEAGUE OF CITIES,
CITY OF LOS ANGELES,
DEPARTMENT OF PUBLIC UTILITY CONTROL
OF THE STATE OF CONNECTICUT,
NATIONAL FEDERATION OF LOCAL
CABLE PROGRAMMERS, et al.,
CITY OF NEW YORK,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,
GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 85-1673

COUNTY OF CONTRA COSTA, CALIFORNIA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

TELE-COMMUNICATIONS, INC.,
BELLSOUTH CORPORATION,
DIRECT SATELLITE COMMUNICATIONS, INC.,
SPACE, SATELLITE TELEVISION INDUSTRY ASSOC.,
GUAM CABLE TV,
GILL INDUSTRIES, INC., et al.,
ASSOCIATION OF INDEPENDENT TELEVISION
STATIONS, INC.,
CENTEL CORPORATION,
POST-NEWSWEEK CABLE, INC.,
OFFICE OF COMMUNICATIONS OF THE
UNITED CHURCH OF CHRIST,
NATIONAL CABLE TELEVISION ASSOCIATION, INC., et al.,
HARRON COMMUNICATIONS CORPORATION, et al.,
NATIONAL ASSOCIATION OF STATE CABLE AGENCIES,
ADAMS-RUSSELL CABLE SERVICES DIVISION OF
ADAMS-RUSSELL, et al.,
CELLULAR TELECOMMUNICATIONS DIVISION OF
TELOCATOR NETWORK OF AMERICA,
CITY OF DUBUQUE, IOWA,
NATIONAL LEAGUE OF CITIES,
CITY OF LOS ANGELES,
DEPARTMENT OF PUBLIC UTILITY CONTROL
OF THE STATE OF CONNECTICUT,
NATIONAL FEDERATION OF LOCAL
CABLE PROGRAMMERS, et al.,
CITY OF NEW YORK,
TEXAS CABLE,
TIME INCORPORATED,
COX CABLE COMMUNICATIONS, INC.,

GARY CHRISTENSEN,
NORTH CAROLINA CATA ASSOCIATION, INC.,
CITY OF ATHENS, OHIO,
UNITED CABLE TELEVISION CORP., et al.,
ARIZONA CABLE TELEVISION ASSOCIATION, et al.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
INTERVENORS

No. 86-1432

YAKIMA VALLEY CABLEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VA,
CITIES OF SUNNYSIDE and GRANDVIEW, WASH. and
CITY OF SOUTHFIELD, MICHIGAN,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
CENTEL CORPORATION, INTERVENORS

No. 86-1439

CONNECTICUT CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
CENTEL CORPORATION, INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

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Argued January 22, 1987

Decided July 17, 1987

Paul S. Ryerson and *Robert T. Perry*, with whom *Robert Alan Garrett* and *Patrick J. Grant* for the City of New York, *Cynthia Pols* and *Frederick Simpech* for National League of Cities, *Michael Botein*, for ACLU, et al., *Edward J. Perez*, Deputy City Attorney for the City of Los Angeles, California, *Garry E. Hunter* for the City of Athens, Ohio, *Michael I. Meyerson* for New York Citizens' Committee for a Responsible Media, *Joseph Van Eaton* for National Federation of Local Cable Programmers, *William B. Gundling*, Assistant Attorney General, State of Connecticut, for the Department of Public Utility Control of the State of Connecticut, and *Edward P. Kearse* for National Association of State Cable Agencies, were on the joint brief for American Civil Liberties Union, *et al.*, petitioners in Nos. 85-1666, 85-1667, 85-1668, 85-1669, 85-1670 and 85-1673 and intervenors in No. 85-1666.

Brent N. Rushforth, with whom *John I. Davis* for Connecticut Cable Television Association, Inc., *Stuart F. Feldstein* for Yakima Valley Cablevision, Inc., *Ian D. Volner* and *Mark L. Pelesh* for Media General Cable of Fairfax, Inc., and *Wesley R. Heppler* and *James F. Ireland, III*, for United Cable Television Corporation, *et al.*, were on the joint brief for Connecticut Cable Television Association, Inc., *et al.* petitioners in Nos. 86-1439 and 86-1432 and intervenors in No. 85-1666. *John P. Cole, Jr.* and *David M. Silverman* entered appearances for intervenor, United Cable Television Corporation, *et al.*

Robyn G. Nietert, with whom *Richard L. Brown* and *Lauritz S. Helland* were on the brief, for Guam Cable

TV, petitioner in No. 85-1671 and intervenor in No. 85-1666.

Gregory M. Christopher, Counsel, Federal Communications Commission, with whom *John E. Ingle*, Deputy Associate General Counsel and *Jane E. Mago*, Counsel, Federal Communications Commission, were on the brief for respondent Federal Communications Commission. *Daniel M. Armstrong*, Assistant General Counsel, Federal Communications Commission, *John J. Powers, III*, *Frederic Freilicher*, *Marion L. Jetton* and *Robert J. Wiggers*, Attorneys, Department of Justice, also entered appearances for respondents, Federal Communications Commission and United States of America in Nos. 85-1666, 85-1667, 85-1668, 85-1669, 85-1670, 85-1671, 85-1673, 86-1432 and 86-1439.

Michael S. Schooler, with whom *Brenda L. Fox* and *Stephen R. Effros* for National Cable Television Association, Inc. *Theodore D. Frank* for Centel Corporation, *David G. Rozelle* and *Kathryn Riley Dole* for Gill Industries, Inc., *Stuart F. Feldstein* for Arizona Cable Television Association, *David J. Saylor* and *Steven J. Horvitz* for Harron Communications Corporation, and *Mark J. Prak* for North Carolina Cable Television Association, Inc. were on the joint brief for intervenors, National Cable Television Association, *et al.* in Nos. 85-1666, 86-1432 and 86-1439.

Gary L. Christensen was on the brief for intervenor, *pro se* in No. 85-1666.

Nicholas P. Miller, *W. Randolph Young* and *Larrine S. Halbrooke* were on the brief for intervenor, City of Dubuque, Iowa in No. 85-1666.

Richard K. Greenberg, Assistant Attorney General, State of Connecticut, was on the brief for intervenor The State of Connecticut and its Commissioner of Revenue Services in No. 85-1666.

B. Jay Baraff and *James E. Meyers* entered appearances for intervenor, Tele-Communications in No. 85-1666.

Robert F. Corazzini and *Peter H. Feinberg* entered appearances for intervenor, Adams-Russell Cable Services, *et al.* in No. 85-1666.

Paul G. Gaston and *Paul J. Berman* entered appearances for intervenor, Cellular Telecommunications Division of Telocator Network of America in 85-1666.

Paul Glist entered an appearance for intervenor, Texas Cable in No. 85-1666.

Jack N. Goodman and *Robert J. Aamoth* entered appearances for intervenor, Time, Inc. in No. 85-1666.

John F. Beasley and *Vincent L. Sgrosso* entered appearances for intervenor, BellSouth Corporation in No. 85-1666.

Phillip L. Spector entered an appearance for intervenor, Direct Satellite Communications, Inc. in No. 85-1666.

David R. Anderson and *Andrea Ann Timko* entered appearances for intervenor, Post-Newsweek Cable, Inc.

James M. Smith and *J. Laurent Scharff* entered appearances for intervenor, Association of Independent Television Stations, Inc. in No. 85-1666.

Donna A. Demac entered an appearance for intervenor, Office of Communications of the United Church of Christ in No. 85-1666.

Henry L. Bauman and *Michael D. Berg* entered appearances for intervenor, National Association of Broadcasters in No. 85-1666.

Donald J. Mulvihill, Hugh P. Morrison, Jr., Kathy M. Silberthau, Rand McQuinn, David Stitt, and *Michael Long* entered appearances for intervenor, The Board of Supervisors of Fairfax County, Virginia in Nos. 85-1666 and 86-1432.

George Y. Wheeler, Alan Y. Naftalin and *Gregory C. Staple* entered appearances for intervenor, Eagle Telecommunications in No. 85-1666.

Craig J. Gehring, John Longstreth and *Henry C. Eisenberg* entered appearances for Cities of Sunnyside and Grandview, Washington, etc. in No. 85-1666 and 86-1432.

Before: EDWARDS, STARR and BUCKLEY, *Circuit Judges.*

Opinion for the Court *Per Curiam.**

Separate Concurring Statement filed by *Circuit Judge* Edwards.

Opinion dissenting in part filed by *Circuit Judge* Starr.

PER CURIAM: In these consolidated cases, we review orders of the Federal Communications Commission ("FCC" or the "Commission") implementing the Cable Communications Policy Act of 1984 (the "Cable Act" or the "Act"), Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.). The orders under review embody a number of "legislative" and "interpretive" rules that have been challenged by an assortment of discontented parties. The central issues raised by these petitions for review, however, are two. The first is whether the FCC properly identified the circumstances and conditions under which local communities (or "franchising authorities") may regulate the rates charged by cable operators for cable services. The second is whether the FCC may, under certain circumstances, decline to resolve disputes over whether particular "taxes" or "assessments" imposed on cable companies by franchising authorities violate the federal standards established by Congress for "franchise fees."

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* Judge Edwards authored Parts I, II.A. and II.B. Judge Starr authored Parts II.A.2. and II.A.3. Judge Buckley authored Parts II.C. and II.D.

Based on our careful review of the FCC orders, and the arguments advanced by the parties, we conclude that the rules adopted by the FCC are, *for the most part*, reasonable and consistent with the provisions of the Cable Act. However, we also find that several aspects of the FCC's rules are either arbitrary or inconsistent with the Act. Accordingly, we affirm in part and reverse and remand in part.

I. BACKGROUND

A. *A Synopsis of Cable Television Regulation Prior to Enactment of the Cable Act*

The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.), grants the FCC broad authority to regulate all aspects of interstate communication by wire or radio. *See generally Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700 (1984); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968). Prior to passage of the Cable Act in 1984, however, the Communications Act did not speak directly to regulation of cable television.[1] Faced with this congressional silence, the FCC—with the approval of the Supreme Court—undertook to regulate cable in those circumstances where regulation was "reasonably ancillary to the effective performance of the Commission's . . . [recognized] responsibilities for the regulation of television broadcasting." *Southwestern Cable*, 392 U.S. at 178; *see also Capital Cities Cable*, 467 U.S. at 699-705; *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-70 (1972); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1439 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).

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[1] Congress incorporated the Cable Act into the Communications Act of 1934. By virtue of this incorporation, the Communications Act now contains a Title VI entitled "Cable Communications." *See* 47 U.S.C. §§ 521-522, 531-533, 541-547, 551-559 (Supp. III 1985).

The FCC, however, was not the only governmental body which asserted an interest in regulating the cable medium. Municipalities (or "franchising authorities") also exercised authority in regulating cable for the benefit of the residents in their communities. In virtually all communities serviced by cable, the municipality determined whether to grant a franchise authorizing a particular company to provide cable service to a specified portion of the community. In exchange for a cable franchise, cable operators were required to assume various responsibilities in the public interest.[2] Typically, franchise agreements obligated cable operators to pay a specified "franchise fee," and to market their services in accordance with rates established by the municipality.

In some respects, the FCC did not interfere with the efforts of local communities to regulate cable television. In at least two important areas, however, the FCC did assume a preemptive regulatory role. First, it placed a cap on the fees that a franchising authority could charge a cable operator for the right to provide cable service. *See* 47 C.F.R. § 76.31 (1983) (now deleted). The asserted purpose of this regulation was to prohibit local franchising authorities from stunting the growth of an increasingly important communications medium through the imposition of excessive fees. *See generally Cable Television Report and Order*, 36 F.C.C.2d 143, 209 (1972).

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[2] Traditionally, one of the justifications for local regulation of cable television has been the fact that cable companies must tear up city streets or string cable along utility poles in order to provide cable service. In granting this right to "use" public resources, municipalities have imposed various responsibilities on the beneficiaries of their largesse. *See, e.g., Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). The existence of physical and economic limitations on the number of cable systems that can be constructed and operated in a single community has also been cited as a justification for local regulation. *See id.* at 1378-79; *but see Quincy Cable TV*, 768 F.2d at 1449-50 (discounting both of these rationales).

Second, the Commission preempted local rate regulation of "nonbasic" or "pay" services, while allowing franchising authorities to regulate the rates charged for the "basic" level (or "tier") of service offered by the cable operator to all subscribers.[3] The Commission reasoned that "pay" services were typically subject to competition from a number of sources, making rate regulation both unnecessary and unwise. *See generally In re Community Cable TV, Inc.*, 95 F.C.C.2d 1204, 1216-17 (1983).

B. *The Cable Act*

This was the state of affairs when Congress enacted the Cable Act in 1984. Although both the FCC and local governments asserted regulatory authority over cable television, the breadth of their respective powers was ill-defined. Responding to this state of regulatory uncertainty, Congress passed the Cable Act in large measure to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." Section 601(3), 47 U.S.C. § 521(3) (Supp. III 1985). In establishing regulatory guidelines, Congress was concerned *both* with relieving the cable industry from unnecessary, burdensome regulation *and* with ensuring that cable systems remain responsive to the needs of the public. *See* § 601(2), (4), (6), 47 U.S.C. § 521(2), (4), (6). Our task in this case is to decide whether the

[3] "Basic" services typically include retransmission of local broadcast signals, access channels, and satellite programming such as CNN and ESPN. The exact number and variety of services that are included in the basic tier will vary—sometimes dramatically—from community to community. "Nonbasic" services, as the term would suggest, are not included in the tier of service regularly provided to all subscribers. Nonbasic services typically include the "premium" movie and sports channels such as HBO and Sportschannel. Recently, however, the traditional distinctions between "basic" and "nonbasic" services have begun to blur at the margin, as cable operators experiment with alternative means of marketing their services.

rules adopted by the FCC have impermissibly altered the balance struck by Congress.

In the Cable Act, Congress addressed both the regulation of cable rates and the permissible level of franchise fees. Section 623 of the Act, 47 U.S.C. § 543, explicitly delegates rulemaking authority to the FCC in the area of rate regulation. Section 623(b)(1) instructs the FCC, within 180 days after enactment of the Act, to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of *basic cable service* in circumstances in which a cable system is *not subject to effective competition.*" 47 U.S.C. § 543(b)(1) (emphasis added). For purposes of these regulations, the FCC must (1) "define the circumstances" in which a cable system is not subject to "effective competition;" and (2) establish "standards" for rate regulation in those circumstances where effective competition does not exist. Section 623(b)(2), 47 U.S.C. § 543(b)(2).

In the area of franchise fees, Congress did not expressly delegate adjudicatory or regulatory authority to any particular administrative, judicial or legislative body.[4] Congress did, however, impose a uniform, federal standard on the level of franchise fees. Specifically, it provided that an annual franchise fee may not exceed five percent of a cable operator's gross revenues. Section 622(b), 47 U.S.C. § 542(b). Congress defined a "franchise fee" as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely

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[4] Several other provisions of the Act, by contrast, delegate adjudicatory or regulatory tasks to a particular governmental body. *See, e.g.*, § 623, 47 U.S.C. § 543 (FCC empowered to issue rate regulations), § 612(d), 47 U.S.C. § 532(d) (federal district courts empowered to determine whether denial of commercial access by cable operator was reasonable), § 611, 47 U.S.C. § 531 (franchising authorities may require cable operators to designate channels for public, educational or governmental use).

because of their status as such." Section 622(g)(1), 47 U.S.C. § 542(g)(1). Congress further specified that a "franchise fee" does not include a tax, fee or assessment of "general applicability," provided that the assessment is not "unduly discriminatory" against cable operators or subscribers. Section 622(g)(2)(A), 47 U.S.C. § 542(g)(2)(A).

Congress, it must be noted, legislated in numerous areas other than rate regulation and franchise fees. For present purposes, however, it is necessary to highlight only a few of the Act's other provisions. Sections 611 and 612 of the Act, 47 U.S.C. §§ 531, 532, relate to the designation of "access" channels by cable operators. Section 611 empowers franchising authorities, in their discretion, to require that cable operators designate channels for public, educational and governmental use. Section 612, in turn, imposes the direct requirement that certain [5] cable operators designate channel capacity for commercial use by unaffiliated persons.[6] Each of these provisions was

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[5] The obligation to provide commercial access, and the extent to which access must be provided, is determined by the channel capacity of the cable operator. The obligation to provide commercial access is not triggered at all unless the cable system has a channel capacity of 36 or more. *See* § 612(b)(1), 47 U.S.C. § 532(b)(1).

[6] Intervenor Gary Christensen—a cable subscriber—asks this court to invalidate §§ 611 and 612 on the grounds that they violate the First and Fifth Amendment rights of cable operators. We decline to address Christensen's challenge for two reasons. First, although Christensen's challenge is styled as a petition for review of an order of the FCC, it is in reality a facial constitutional challenge to the validity of §§ 611 and 612. Accordingly, Christensen was required to file his claim in federal district court under the general federal question statute, 28 U.S.C. § 1331 (1982).

Second, Christensen has plainly failed to establish that he has standing to adjudicate his claim. As noted above, Christensen seeks relief based on alleged violations of the constitutional rights of cable operators. Subject to certain

designed to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." Section 601(4), 47 U.S.C. § 521(4).

In harmony with the statutory goal of broadening the availability and diversity of cable programming, section 621(a)(3), 47 U.S.C. § 541(a)(3), requires a franchising authority to assure that access to cable service is not denied to any group "because of the income of the residents of the local area in which such group resides." This provision is a direct attempt to prohibit the practice of "redlining," by which cable operators refuse to wire low-income neighborhoods for cable service. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4696 (*"House Report"*). Finally, section 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A), requires cable operators to provide a "device" (or lock box) by which a subscriber can prohibit the viewing of a "particular cable service." The stated purpose of this statutory provision is to enable cable subscribers to restrict the viewing of programming that they consider "obscene or indecent." *Id.*

C. *The Commission's Rules*

Shortly after passage of the Cable Act, the FCC initiated a rulemaking to implement the Act's various provisions. After receiving comments from over 140 parties, including cable companies and their trade associations, municipalities, public interest groups and the Antitrust Division of the Department of Justice, the Commission issued its Report and Order in *Implementation of the*

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exceptions, however, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 509-10 (1975). Here, Christensen has failed to establish that he falls within any of the exceptions to this general rule.

Provisions of the Cable Communications Policy Act of 1984 (*"Report and Order"*), 50 Fed. Reg. 18,637 (1985).

The primary focus of the rulemaking was to identify the circumstances and conditions under which franchising authorities would be permitted to regulate the rates charged by cable operators for "basic cable service." Because section 623 of the Act expressly instructed the FCC to permit local rate regulation in those circumstances where cable systems did not face "effective competition," the critical question before the FCC was how to measure the existence of "effective competition." Based on the comments submitted by the various parties, an internal staff study and materials drawn from the economic literature, the Commission concluded that effective competition would be deemed to exist where any three "off-the-air" [7] broadcast signals were "available" in the cable community. *See Report and Order*, 50 Fed. Reg. at 18,648-50. The Commission ruled that a broadcast signal would be deemed "available" in either of the following circumstances: (1) the signal placed a predicted Grade B contour over *any* portion of the cable community; [8] or

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[7] An "off-the-air" broadcast signal is one that is transmitted by a "local" television station and received directly by a consumer by means of a home antenna, as opposed to a signal available only through cable or satellite transmission. *See Notice of Proposed Rulemaking*, 49 Fed. Reg. 48,765, 48,770 (1984).

[8] A "predicted Grade B contour" is a measurement of the anticipated strength of a broadcast signal. Use of the Grade B contour enables the FCC to predict the "approximate extent" to which a signal is viewable in the community covered by the contour. *See* 47 C.F.R. § 73.683(a) (1985). The predicted contour, however, is based on general engineering principles, and does not take into account site-specific factors that could affect the actual broadcast signal strength in a community. Thus, the predicted contour does not take into account the extent to which "terrain" or "interference" disturbs the ability of viewers to receive a clear picture. *Id.* Nor does it guarantee that a picture will *in fact* be "viewable" by those

(2) the signal was "significantly viewed" in the community.[9] *See id.* at 18,650-51. Franchising authorities, however, would be permitted to submit "showings and engineering studies" indicating that a signal was not "in fact" available "anywhere" within the cable community. *Id.* at 18,651.

Having settled on a definition of "effective competition," the FCC went on to prescribe "standards" of rate regulation for those franchising authorities (few in number, as the FCC concedes) that would retain the authority to regulate "basic cable" rates under the Commission's rules. Three of those "standards" are pertinent here. First, the FCC adopted a definition of the term "basic cable service." Although the Act itself contains a definition of this phrase,[10] the Commission found that the Act's legislative history authorized it—for the purpose of adopting rate regulation "standards"—to fashion an alternative definition. The Commission exercised this purported

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within the range of the contour even in the absence of hilly terrain or other interference. Of course, "viewability" of a signal is a subjective concept; what constitutes a "viewable" picture for some may not be satisfactory to others.

[9] A signal is considered to be "significantly viewed" if it is watched by a certain percentage of viewers in a community. The percentage share that a signal must attain to be considered significantly viewed varies depending on whether the television station is a network affiliate or an independent. 47 C.F.R. § 76.54 (1985) references a list of broadcast signals that the FCC currently considers to be significantly viewed. The FCC has established waiver procedures, however, by which franchising authorities may demonstrate that signals listed as significantly viewed should no longer qualify for that status. *See In re KCST-TV, Inc.*, 59 Rad. Reg. 2d (P & F) 1270, 1274 (1986). The Commission is in the process of revising its rules to formalize these procedures.

[10] The Act defines "basic cable service" as "*any* service tier which includes the retransmission of local television broadcast signals." Section 602(2), 47 U.S.C. § 522(2) (emphasis added).

authority by defining "basic cable service" as "*the* tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast television signals." [11] *Report and Order*, 50 Fed. Reg. at 18,653 (emphasis added).

Second, the FCC permitted cable operators to pass through to their subscribers certain "identifiable" costs incurred in the provision of basic service. These costs, the Commission found, could *automatically* be incorporated in the operator's rates without franchising authority approval. *Id.* at 18,654-55. Third,[12] the FCC granted a one-year exemption from rate regulation to those cable operators who become subject to regulation by virtue of changed circumstances.[13] This one-year exemption, the Commission reasoned, would give a cable operator sufficient time to make the transition from an unregulated to a regulated entity. *Id.* at 18,651.

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[11] This court recently invalidated the FCC's "must-carry" rules in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 2889 (1986). In response to this decision, the Commission revised its definition of basic cable service to replace the reference to "must-carry" signals with the specific characteristics that had formerly qualified signals for "must-carry" status. *See Cable Television; Reconsideration of the Implementation of the Cable Communications Policy Act of 1984*, 51 Fed. Reg. 21,770, 21,771 (1986). This technical change, however, does not alter the basic feature of the definition; namely, that franchising authorities may regulate only the *single* tier of service regularly provided to all subscribers.

[12] In its order the Commission did not refer to this third rule as a "standard" of rate regulation. *See Report and Order*, 50 Fed. Reg. at 18,651. However, it has been treated as such by the parties, and for purposes of our analysis we will accept the parties' characterization.

[13] For example, a cable operator in a community within the range of three Grade B contours would become subject to rate regulation under the Commission's rules if one of the broadcast stations in the community should go dark, reduce its power, or adjust the direction of its signal. *See id.*

In its *Report and Order*, the Commission also addressed the issue of franchise fees. Specifically, the Commission considered two distinct questions. The first was whether to retain its rule, 47 C.F.R. § 76.31 (1983), setting a cap on the level of franchise fees. The second was whether to continue the Commission's past practice of adjudicating disputes over whether a particular tax, fee or assessment imposed on cable operators constituted a "franchise fee" (and hence could be counted towards the cap on fees).

The Commission had little difficulty answering the first question; because the Cable Act itself had established a five percent limit on fees, there was no longer any need or justification for the Commission to retain its own limitation.[14] The Commission further announced that it would refuse to adjudicate disputes over whether particular taxes, fees or assessments could be deemed "franchise fees" under the definition provided by Congress in the statute. Essentially, the Commission found that the Cable Act had eliminated the need for it to regulate in the area of franchise fees, and that disputes concerning fees were "best resolved through the courts." *Report and Order*, 50 Fed. Reg. at 18,648.

The Commission then went one step further in its *Report and Order*. Rather than adopting its new enforcement policy on a prospective basis only, the Commission announced that it would not reinstate petitions that had been filed *prior* to enactment of the Cable Act. All such pending petitions had been dismissed by the Commission following enactment of the Cable Act, on a Commission finding, *inter alia*, that the Cable Act had limited its "jurisdiction and authority" in the area of franchise fees.[15] In its *Report and Order*, in sustaining

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[14] Indeed, § 622(i), 47 U.S.C. § 542(i), provides that no "Federal agency" may regulate the amount of fees paid by a cable operator.

[15] *See In re City of Southfield, Michigan*, FCC Mimeo No. 1442, order at 3 (released Dec. 19, 1984).

this policy of forbearance, the Commission reasoned that it no longer had a "regulatory interest" in adjudicating franchise fee disputes that had, in its judgment, been rendered "moot" by passage of the Cable Act. *Id.* at n.55. The Commission did not reiterate its previous contention that the Cable Act had limited its "jurisdiction and authority" over franchise fees.

Two parties with franchise fee disputes pending before the FCC prior to enactment of the Cable Act—Yakima Valley Cablevision, Inc. ("Yakima") and the Connecticut Cable Television Association, Inc. ("CCTA"),[16]—brought suit in this court challenging both the Commission's policy of "forbearance" [17] and its decision to apply that policy retroactively to petitions pending prior to enactment of the Cable Act. In *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986), this court held that the FCC had not sufficiently explained its decision to apply its new policy retroactively.[18] We further held, however, that the petitioners' challenge to the FCC's prospective policy of forbearance was best raised in the instant case, reasoning that "the full sweep of the FCC's rationale is better understood in a careful review of the entire Cable Act rulemaking." *Id.* at 744.

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[16] The issue that Yakima sought to adjudicate was whether a "business and occupation" tax levied upon it by the cities of Sunnyside and Grandview, Washington constituted a "franchise fee." The issue raised by CCTA was whether a "gross earnings tax" imposed on cable television companies pursuant to a Connecticut statute was a "franchise fee." *See Yakima Valley Cablevision, Inc.* v. *FCC*, 794 F.2d 737, 742 (D.C. Cir. 1986).

[17] In the suit brought by Yakima and CCTA, the FCC characterized its policy of not adjudicating franchise fee disputes as one of "forbearance."

[18] On remand, the FCC agreed to resolve the status of taxes that had been imposed on Yakima and CCTA *prior* to enactment of the Cable Act. *See Yakima Valley Cablevision, Inc.*, 61 Rad. Reg. 2d (P & F) 472 (1986).

Shortly before *Yakima* was decided, however, the Commission reexamined and modified its policy of "forbearance" in response to a petition for reconsideration. *See In re Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984 ("Reconsideration")*, 60 Rad. Reg. 2d (P & F) 514 (1986). In its modified order, the Commission conceded for the first time that it retained jurisdiction to adjudicate franchise fee disputes arising under the Cable Act.[19] The Commission also abandoned its position that it no longer had a "regulatory interest" in entertaining *any* such disputes. Nevertheless, the Commission concluded that *most* franchise fee disputes were best resolved through the courts.[20] The Commission announced that it would entertain fee disputes only where the claim "directly impinge[d]" on a "national policy concerning cable communications" and implicated the agency's expertise. *Reconsideration*, 60 Rad. Reg. 2d (P & F) at 518 (quoting § 601(1), 47 U.S.C. § 521(1)). In accordance with this policy, the Commission announced that it would *not* resolve disputes over whether particular local taxes could be considered "franchise fees" within the meaning of the Act. The Commission reasoned, *inter alia*, that it possessed no expertise in matters of local taxation, that "local courts"[21] were

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[19] The Commission observed that § 1 of the Communications Act "provides that the Commission shall 'execute and enforce the provisions of [the] Act.'" *Reconsideration*, 60 Rad. Reg. 2d (P & F) at 517. As noted earlier, the Cable Act has been incorporated into the Communications Act. *See* note 1 *supra*.

[20] In the parties' briefs and at oral argument, this modified enforcement policy has been termed one of "partial" forbearance.

[21] The Commission speculated that federal courts might be barred from adjudicating such tax disputes by the terms of the Tax Injunction Act, 28 U.S.C. § 1341 (1982). The Tax Injunction Act prevents federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy

better situated to resolve such issues, and that the relevance of such matters to a national policy concerning cable communications was "slight." *Id.* at 518-19.

Finally, the Commission's *Report and Order* adopted three "interpretive" rules that are challenged by several petitioners herein.[22] The three rules pertain to the Act's requirement that cable operators provide lock boxes to interested cable subscribers, *see* § 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A), the requirement that franchising authorities prohibit the practice of redlining, *see* § 621(a)(3), 47 U.S.C. § 541(a)(3), and the requirement that certain cable operators afford commercial access to unaffiliated persons, *see* § 612, 47 U.S.C. § 532. Because we will discuss these three interpretive rules in a separate subsection, we postpone until then a description of the rules and our analysis respecting their validity.

II. Analysis

A. *Rate Regulation*

The FCC's rate regulation rules—which will effectively prohibit the regulation of cable rates in the overwhelming majority of local communities—are challenged by several individual municipalities, the National League of Cities and other interested parties. The petitioners launch a broad assault on virtually every argument cited by the FCC in support of its rules, and every component of the rules themselves. Thus, the petitioners assert that the FCC acted arbitrarily and irrationally in defining "effec-

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or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Tax Injunction Act prohibits even declaratory relief. *See California v. Grace Brethren Church*, 457 U.S. 393 (1982).

[22] The petitioners are the American Civil Liberties Union, the Cable Television Access Coalition, the National Federation of Local Cable Programmers and the New York Citizens' Committee for Responsible Media.

tive competition" in terms of a *single* criterion (the availability of broadcast signals), in selecting "three" as the number of signals expected to offer sufficient competition to the myriad of services offered by cable systems, and in defining the availability of signals in terms of their *theoretical* viewability in the cable community. The petitioners also assail the rate regulation "standards" adopted by the FCC, arguing that they are arbitrary and inconsistent with the express terms of the Cable Act.

Upon careful consideration of the arguments raised by the petitioners, and applying familiar principles of judicial review,[23] we conclude that the FCC's rate regula-

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[23] All parties agree that the FCC's rules must be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A) (1982). In *NAACP v. FCC*, 682 F.2d 993, 997-98 (D.C. Cir. 1982), this court summarized the basic framework for making this determination in the context of an agency rulemaking:

> [The] agency action is presumed to be valid in the absence of a substantial showing to the contrary. The court's review is not merely a summary endorsement, however, but should be searching and careful. While the level of review is not to be perfunctory it is relatively narrow and designed only to ensure that the agency's decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors. This includes the agency's addressing the significant comments made in the rulemaking proceeding. . . . [W]e will demand that the Commission consider reasonably obvious alternative . . . rules, and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review. At the same time, however, our review of the Commission's factual, and particularly its policy, determinations will perforce be a narrow one, limited to ensuring that the Commission has adequately explained the facts and policy concerns it relied on and to satisfying ourselves that those facts have some basis in the record. Finally, we must see "whether those facts and legislative considerations by themselves could lead a reasonable person to make the judgment that the Agency has made."

(citations omitted).

tion rules are, for the most part, neither arbitrary, capricious nor otherwise contrary to law. With certain exceptions enumerated below, the FCC addressed the significant comments made in the rulemaking proceeding, articulated the basis for its conclusions, and adopted rules that are at a minimum "reasonable." It is irrelevant, of course, that we might have defined "effective competition" differently had we been presented in the first instance with the facts before the Commission. Having satisfied ourselves that the Commission carefully considered proposed alternatives, explained the reasons underlying its decision, and reached a rational conclusion, our role under the Administrative Procedure Act is largely at an end. Guided by these well-established principles of judicial review, we hold that the FCC's rate regulation rules are affirmed in all respects except to the extent specifically delineated below.

In concluding that the FCC's rate regulation rules are in most respects "reasonable," we note that the Cable Act grants the Commission broad discretion in constructing its definition of "effective competition." The Act itself offers no guidance on what factors the Commission should consider, or what weight it should assign to those factors. Unable to identify any such statutory directives, the petitioners place substantial reliance on language in the House Report suggesting that the Commission should consider a *variety* of factors in framing its definition of "effective competition." [24] The same paragraph in the House Report, however, states that the FCC "*may* find it relevant" to consider factors in addition to the number of off-the-air broadcast stations available in a cable community. *Id.* (emphasis added). Even assuming, then,

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[24] The Report states that the FCC "should consider the number and nature of [cable] services provided, compared with the number and nature of services available from alternative sources and, if so, at what price." *House Report* at 66, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4703.

that the House Report can be viewed as a reliable indicator of congressional intent, the Report simply does not constrain the FCC's discretion in the manner urged upon us by petitioners. The FCC's mandate was to "consider" various alternatives, including, it seems, one in which effective competition would be measured solely in terms of the availability of off-the-air broadcast signals. The FCC considered the alternatives suggested by the commenters and offered cogent reasons for adopting a three-signal availability standard. It therefore cannot be said that the Commission acted arbitrarily, capriciously or otherwise contrary to law.

Before turning to those aspects of the Commission's rate regulation rules that *cannot* be upheld, one additional observation is in order. With admirable candor, the FCC concedes that its decision to define "effective competition" in terms of the availability of three broadcast signals was not an exercise in "scientific precision." [25] Rather, the Commission made a predictive judgment based on the evidence it had accumulated in the relatively short time frame within which Congress directed the agency to complete its rulemaking. In light of the speed with which the FCC was compelled to act, and the statutory command that the Commission "periodically review" its rate regulation rules,[26] we wish to make clear that we fully anticipate that the Commission will carefully monitor the effects of its regulations and make adjustments where circumstances so require. In one sense, of course, our admonition is superfluous, since we would not expect the Commission to adhere blindly to regulations that are cast in doubt by new developments

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[25] Brief for the Federal Communications Commission at 36.

[26] *See* § 623(b)(3), 47 U.S.C. § 543(b)(3). Section 623(h), 47 U.S.C. § 543(h), also directs the FCC to conduct a study and submit a report to Congress within six years outlining the effects of its regulations on "competition in the marketplace."

or better understanding of the relevant facts.[27] However, where the Commission itself has recognized the tentative nature of its predictive judgments, and alluded to the possibility that future studies will alter its principal conclusions, we find it particularly appropriate to emphasize the need for the Commission to vigilantly monitor the consequences of its rate regulation rules.

While the Commission's actions in general are not arbitrary, capricious, or otherwise contrary to law, we conclude that in several respects the Commission has gone astray. Specifically, three aspects of the Commission's rules cannot stand: (1) the redefinition of "basic cable service"; (2) the automatic pass through; and (3) the signal availability standard. We consider each in turn.

1. *Redefinition of "Basic Cable Service"*

Section 602(2) of the Cable Act defines the term "basic cable service" as follows:

> [T]he term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals.

47 U.S.C. § 522(2). However, in performing its statutory task of "establish[ing] standards for . . . rate regulation," *id.* § 543(b)(2)(B), the Commission crafted a definition of "basic cable service" that departs materially from that set forth in the statute:

> Basic cable service is the tier of service regularly provided to all subscribers that includes the retransmission of all must-carry broadcast signals . . . and the public educational and governmental channels, if required by a franchising authority . . . .

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[27] *Cf. American Trucking Ass'ns v. Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.").

Report and Order, 50 Fed. Reg. at 18,653.[28]

There is an important distinction between these two definitions with respect to the treatment of cable systems configured so as to include broadcast signals on every tier.[29] As Congress has defined the term, "basic cable service" would encompass these multiple tiers of cable service, since the statutory definition refers to "any service tier." Under this system, any tier that includes the "retransmission of local television broadcast signals," even if this encompassed every tier offered by a cable operator, would be considered "basic cable service." *Cf.* House Report at 40 (recognizing statutory definition could involve labeling multiple tiers to be "basic cable service"), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4677.

Under the Commission's system, on the other hand, only one service tier of a particular cable system can be

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[28] After this court overturned the FCC's "must-carry" rules in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), the Commission solicited comment on the ramifications of *Quincy* for the definition of "basic cable service." The FCC concluded that *Quincy*'s invalidation of the must-carry rules posed only a technical problem and accordingly amended the definition to omit reference to the must-carry rules and substitute the specific characteristics that had qualified broadcast signals for must-carry status. *See* note 11 *supra*.

[29] Cable operators typically market their service by bundling an assortment of channels together and offering them as a group, or "tier." At least two tiers are usually available. Thus, for example, a cable operator may offer local broadcast signals plus some satellite delivered services, such as CNN and ESPN, as "Tier *A*," and offer a variety of premium services, such as Home Box Office or the Disney Channel, as "Tier *B*." A subscriber will almost invariably be required to purchase Tier *A* to receive Tier *B*. Precisely how to configure its offerings is, under the Cable Act, generally left to the operator's discretion. *See* 47 U.S.C. § 545(d) (permitting rearrangement so long as no service tier is subject to rate regulation).

labeled "basic cable service," regardless of whether that cable operator configures its system so that each tier includes local broadcast signals. The Commission's stated justification for its departure from the statutory language is the Cable Act's legislative history, a portion of which suggests that the FCC has discretion to announce a new definition.[30] Specifically, the FCC rests on the following language from the House Report:

> The Committee wishes to stress that it intends to give the Commission flexibility in promulgating these regulations. The definition in Sec. 602 [47 U.S.C. § 522(c)] of basic cable service is intended primarily for use in determining the extent of regulation that will be permitted during the . . . transition period. The regulations of the Commission under [subsection 623(b), 47 U.S.C. § 543(b)] serve a different purpose—defining the circumstances and extent of regulation that may occur beyond the transition period. As such, the Commission may fashion a definition of basic cable services most appropriate to achieve the purpose of the regulations, consistent with the provisions of Title VI.

Id. at 66, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4703; *see also* FCC Brief at 11-12 (invoking House Report language); *Report and Order*, 50 Fed. Reg. at 18,652 (same). With this go-ahead from the legislative history, the Commission invokes what it perceives to be the general deregulatory focus of the Act, *Report and Order*, 50 Fed. Reg. at 18,652-53, as well as prior "longstanding" Commission precedents, *id.* at 18,653, both of which, in the Commission's view, counsel in favor of a narrower definition of basic cable service than that set forth in the statute.

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[30] The FCC also points to the broad discretion the Cable Act confers upon it, as well as more generic principles of deference to administrative agencies. *See, e.g.*, FCC Brief at 31 n.22, 33.

Also featured prominently in the FCC's explication is the argument that application of the statutory definition would lead to anomalous results. *See* FCC Brief at 19-20; *Report and Order*, 50 Fed. Reg. at 18,653 & n.81. Specifically, use of the section 602(2) definition could lead to two different cable companies offering identical services having a different number of service tiers being considered "basic cable service"; this critical difference would thus be based solely on the way these two hypothetical cable operators chose to market their services.[31] In the Commission's view, applying the statutory definition and reaching different results for two such compa-

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[31] This can be seen by considering hypothetical cable operators *X* and *Y*, each of which offer three service tiers. Operator *X* markets its services as follows: (1) Tier *A*, consisting of local broadcast signals and a weather channel, for $10 per month; (2) Tier *B*, consisting of the satellite services ESPN and CNN, for $5 per month; and (3) Tier *C*, consisting of Home Box Office and the Disney Channel, for $10 per month. Operator *X* requires that subscribers purchase Tier *A* in order to purchase Tier *B*, and to purchase Tiers *A* and *B* in order to purchase Tier *C*. Operator *Y*, in contrast, markets its services in this way: (1) Tier 1, consisting of local broadcast signals and a weather channel, for $10 per month; (2) Tier 2, consisting of local broadcast signals, a weather channel, ESPN, and CNN, for $15 per month; and (3) Tier 3, consisting of local broadcast signals, a weather channel, ESPN, CNN, Home Box Office, and the Disney Channel, for $25 per month. A subscriber purchasing Tiers *A*, *B*, and *C* from cable operator *X* is obviously receiving the same services, at the same price, as a subscriber purchasing Tier 3 from operator *Y*. Yet, because cable operator *Y* employs a cumulative, rather than an incremental, marketing and pricing approach, it faces the prospect of having Tiers 1, 2, and 3 all subject to rate regulation if the statutory definition were used. Operator *X*, on the other hand, has only one service tier, Tier *A*, potentially subject to rate regulation if the statutory definition were employed. In contrast, under the Commission's definition only one tier would be potentially subject to rate regulation in each cable system—in Operator's *X*'s system, Tier *A*, and in operator *Y*'s system, Tier 1.

nies would represent a triumph of form over substance. Such a result, the FCC argues, is "clearly not intended by the statute." *Report and Order*, 50 Fed. Reg. at 18,653 n.81; *see also* FCC Brief at 20 (labeling every tier of cable service as basic cable service "would clearly contravene the legislative intent and the statutory definition of basic cable service was therefore rejected by the Commission"). *But cf.* House Report at 40 ("The Committee recognizes that . . . [i]n some franchises this [definition] will mean that basic cable service includes multiple service tiers."), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4677.

This rather technical, definitional dispute is significant because under the Cable Act only "basic cable service" is potentially subject to rate regulation by local franchising authorities. *See* 47 U.S.C. § 543(b). Thus, the definition of "basic cable service" sets the parameters of the respective jurisdictions of local franchising authorities and the Commission. The fact that construction of the statutory term directly impacts such jurisdictional determinations should, in our view, be factored into a proper analysis of the statutory issue we face. *Cf. Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986).[32] That issue may be simply stated: Does

[32] In our view, a pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going to the agency's power to regulate an activity or substance, *cf. Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986)—and provisions that are managerial—that is, provisions pertaining to the mechanics or inner workings of the regulatory process, *cf. Young v. Community Nutrition Institute*, 106 S. Ct. 2360 (1986). Where the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent. The reason is that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency

the FCC enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with a definition of that very term contained in the Act itself? The question, we believe, answers itself. The Commission, however, answers yes.

Our task "in assessing a claim that an agency action contravenes its governing statute," *FAIC Securities, Inc. v. United States*, 768 F.2d 352, 361 (D.C. Cir. 1985), has been marked out by the Supreme Court in *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43 (1984). We are instructed to first determine

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Id. at 842-43. It is only if Congress' intent is "silent or ambiguous" that we consider, and grant deference to, the agency's construction. *Id.* at 843.

In making this determination of whether "Congress had an intention on the precise question at issue," the *Chevron* Court indicated that we were to employ "traditional tools of statutory construction." *Id.* at 843 n.9. The Commission employs a tool of statutory analysis, focusing solely on one passage from the House Report accompanying the Cable Act. As mentioned above, that passage indicates that the statutory definition was to apply "primarily" during the two-year transition period, and that after this period the Commission could fashion its own definition consistent with the provisions of the

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the power to define the scope of its own power. When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.

Act. *See Report and Order*, 50 Fed. Reg. at 18,652 (quoting House Report at 66, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4703). But the Commission's argument has overlooked an important component of a proper statutory analysis. While legislative history is undoubtedly one of the "traditional tools" of which *Chevron* speaks, it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself. *See, e.g., Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (same, citing other cases). This case poignantly illustrates the wisdom of this principle, for in leapfrogging ahead to the legislative history without carefully dwelling on the statute itself, the Commission has fallen into interpretive error.

Turning to the language of the statute, we find that on the issue of defining "basic cable service," the statute speaks with crystalline clarity. It provides a precise definition in section 602(2) for the exact term the Commission now seeks to redefine. The statute in no wise indicates that the 602(2) definition is only transitory. From the face of the statute then, we are left with no ambiguity and thus no need to resort to legislative history for clarification. As this court has stated, "[o]nly where [the statutory] expression is genuinely ambiguous," *FAIC Securities*, 768 F.2d at 362, is legislative history useful or necessary. *Id.*; *see also Burlington N. R.R. v. Oklahoma Tax Comm'n*, 107 S. Ct. 1855, 1859-60 (1987); *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980) ("Where the plain language . . . is as strong as it is here, ordinarily 'it is not *necessary* to look beyond the words of the statute.'") (quoting *TVA v. Hill*, 437 U.S.

153, 184 n.29 (1978) (emphasis in original)); *United States v. Oregon*, 366 U.S. 643, 648 (1961) ("Having concluded that [the statutory provisions] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.").

The Supreme Court recently followed such an interpretive approach in an analogous setting in *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986). *Dimension Financial* presented the Court with two Federal Reserve Board regulatory definitions which conflicted with statutory provisions. In considering one such regulatory provision—the Board's definition of "demand deposit"—the Court looked only to the statutory language, which it found conclusive. The Court did not even cite any legislative history in this phase of its analysis, despite the fact that the Tenth Circuit had considered the statute's legislative history. *See* 744 F.2d 1402, 1407-08 (10th Cir. 1984).

Following the Supreme Court's lead, we similarly decline to give overmuch weight to the measure's legislative history inasmuch as we find the pertinent part of the statute clear and unambiguous. The general interpretive principle—a reluctance to rely upon legislative history in construing an *unambiguous* statute—is of especial force where, as here, resort to legislative history is sought to support a result *contrary* to the statute's express terms. Whatever the limitations of the "plain meaning" rule in the run-of-the-mine case, "[w]e find no mandate in logic or in case law for reliance on legislative history to reach a result *contrary* to the plain meaning of a statute." *United Air Lines, Inc. v. CAB*, 569 F.2d 640, 647 (D.C. Cir. 1977) (emphasis in original); *see also IBEW, Local No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987); *Universal City Studios v. Sony Corp.*, 659 F.2d 963, 968-69 (9th Cir. 1981); *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305, 1310 (S.D.N.Y. 1982) (It is "clear that a plain

reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself."); *cf. United States v. American College of Physicians*, 106 S. Ct. 1591, 1598-99 (1986) ("[D]espite the [Committee] Report's seeming endorsement of a *per se* rule, we are hesitant to rely on that inconclusive legislative history either to supply a provision *not* enacted by Congress . . . or to define a statutory term enacted by a prior Congress. . . . We agree, therefore, with . . . [the] rejection of the . . . argument that . . . Congress intended to establish a *per se* rule.") (citations omitted).

This is precisely the temptation to which the FCC would have us succumb. The Commission asks us to disregard clear statutory language and embrace contraindications found in a committee report, but which are not without ambiguity themselves. Even if the pertinent passage from the House Report is seen as speaking with complete clarity, the fact remains that committee reports, even authoritative committee reports,[33] are not law. *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1570 n.13 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985). Accordingly, we decline the Commission's invitation. We will not permit a committee report to trump clear and unambiguous statutory language. Rather, because there is no ambiguity on the face of the statute,[34]

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[33] The report at issue here was drafted by the House Committee on Energy and Commerce but was specifically adopted by both the House and Senate as their explanations of the Act. *See* 130 Cong. Rec. S14,285 (daily ed. Oct. 11, 1984); 130 Cong. Rec. H12,245 (daily ed. Oct. 11, 1984).

[34] Our independent examination of the Cable Act reveals only one potential ambiguity with respect to the universal applicability of section 602(2)'s definition of "basic cable service." Specifically, section 623(c)(1), in discussing the extent of rate regulation to be allowed during the two-year transition period, indicates that

we believe that the definition of "basic cable service" established by Congress in section 602(2) should apply in all circumstances.[35]

In our view, application of the statutory definition will not lead to unreasonable results. *Cf. United Air Lines*, 569 F.2d at 647. As noted above, *see* pp. 34-35, *supra*, the FCC complains that the statutory definition, by sanctioning the labeling of multiple service tiers as "basic cable service," will lead to different treatment of cable operators based solely on marketing differences. This type of "form over substance" result may indeed be the

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> the franchising authority may, to the extent provided in a franchise—
>
> (1) regulate the rates for the provision of basic cable service, *including multiple tiers of basic cable service.*

47 U.S.C. § 543(c)(1) (emphasis added).

The fact that Congress felt it necessary to qualify the term "basic cable service," as well as the context—section 623(c) deals with the transition period—lends some credence to the FCC's theory that the section 602(2) definition applies only during the transition period and perhaps injects some ambiguity into the statutory scheme with respect to the applicability of section 602(2)'s definition. If section 623(c)(1) is read in this way, then resort to the legislative history may well be appropriate, and the House Report language trumpeted by the Commission would have some force. However, neither the FCC nor intervenors in support of the FCC have advanced such an interpretation. And, more importantly, this view of section 623(c)(1) is nowhere to be found in the *Report and Order*. Accordingly, we do not consider this potential argument.

[35] *Cf. Train v. City of New York*, 420 U.S. 35, 45 (1975) ("[L]egislative intention, without more, is not legislation."); *International Union, United Automobile, Aerospace Agricultural Implement Workers v. Donovan*, 746 F.2d 855, 860 (D.C. Cir. 1984) (same, quoting *Train*); Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121 (1948) (" 'We do not inquire what the legislature meant, we ask only what the statute means.' ") (quoting Holmes, J.).

upshot of the statutory definition. But such a result is hardly absurd. *Cf. Commissioner v. Brown*, 380 U.S. 563, 571 (1965) ("Unquestionably the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results.'") (quoting *Helvering v. Hammel*, 371 U.S. 504, 510-11 (1941)); *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (same; quoting *Commissioner v. Brown*). Under the Cable Act, cable operators generally have the freedom to structure their service tiers in whatever way they wish. 47 U.S.C. § 545(d). While application of the statutory definition may lead them to choose one structure over another, this is hardly unreasonable. In any event, we discern no difficulties with application of the statutory definition that would lead us to reject it as irrational, unreasonable, or absurd.

In sum, applying the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, we are persuaded that Congress did indeed have an intent on the "precise question at issue." *Id.* at 842. This is not a situation where Congress has left gaps for the agency to fill. *Cf. id.* at 843-44. Rather, Congress has spoken directly and specifically by providing a definition of the exact term the Commission now seeks to redefine. And as noted above, Congress intended its definition of "basic cable service" to be just that—a comprehensive definition of the term. We are instructed by *Chevron* that "that is the end of the matter" and directed to "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. We do so and hold that the Commission's redefinition of "basic cable service" is contrary to law; the Commission must apply the section 602(2) definition.

2. *Automatic Pass Through*

In addition to directing the FCC to develop regulations defining the circumstances in which effective competition

exists (and rate regulation is therefore permissible), section 623 of the Act instructs the Commission to "establish standards for such rate regulation." 47 U.S.C. § 543(b)(2)(D). In its *Notice of Proposed Rulemaking*, the Commission described this task as "not only specifying what services can be regulated but also in what manner." 49 Fed. Reg. at 48,771.

After noting that it was provided "no specific guidance regarding the establishment of a rate regulation standard," the FCC offered its "tentative view" as to what administrative procedures should be used by franchising authorities in setting rates. *Id.* Then, "[w]ith respect to the substance of the rate making decision," *id.*, the Commission discussed its preference for a "zone of reasonableness" approach, and "[a]ccordingly . . . propose[d] that franchise authorities may prescribe rates that are within 10 percent, either above or below, of the average rate of the comparable cable systems." *Id.*

In its *Report and Order*, the Commission reported that in their comments on these proposed rate regulation standards a number of cable interests had recommended that automatic "pass-throughs" be permitted. The FCC agreed:

> Accordingly, our rules will permit cable systems to automatically pass through any readily identifiable increase (or decrease) in cost which is entirely attributable to the provision of basic service, *e.g.*, the price of programming appearing on the basic service tier and copyright fees for retransmission of distant broadcast signals appearing on the basic service tier. These rate increases may be taken in addition to the 5% automatic annual increase to which most cable systems are entitled.

Report and Order, 50 Fed. Reg. at 18,655. The only rationale the FCC offered for this ruling is avoidance of what would be *pro forma* administrative proceedings, by virtue of the fact that the requested rate increase in such circumstances is due solely to increased cost. *See*

id. ("value of automatic pass through . . . is the avoidance of *pro forma* administrative proceedings").

As noted above, the FCC promulgated this pass-through rule in the course of establishing "standards for rate regulation," thereby purporting to rely on section 623, or more precisely subsection 623(b)(2)(B), as authority. We conclude, however, that erecting this pass-through mechanism exceeded the Commission's authority under section 623. That provision begins with the admonition that "[a]ny federal agency . . . may not regulate . . . rates except to the extent provided under this section." 47 U.S.C. § 623(a). Given that delimiting provision, the FCC would seem to be impermissibly stretching the bounds of its lawful power when it uses a general direction to establish "standards for rate regulation" to justify direct regulation of the permissible amount of a rate increase.

But that is not all. In establishing the automatic pass through, the Commission has done more than potentially exceed the authority granted to it in subsection 623(b)(2)(B). The Commission has sought to employ this general power to fill a gap, as it were, by permitting automatic pass throughs. The problem is that no gap exists. The pass-through rule addresses a subject matter comprehensively treated by Congress in the Cable Act; indeed, this very subject is covered in other subsections of section 623.

Subsection (e)(1) of section 623 by its terms permits an automatic five percent per year increase "at the discretion of the cable operator." 47 U.S.C. § 543(e)(1). This increase is to be "[i]n addition to any other rate increase which is subject to the approval of a franchising authority." *Id.* Moreover, a different subsection of section 623, subsection (d), permits a cable operator to treat as granted any request for a rate increase on which the franchising authority does not act within 180 days. *Id.* § 543(d).

Taken together, these provisions create an elaborate scheme for automatic rate increases. By sanctioning such automatic increases, Congress was addressing concerns similar to those animating the FCC's development of its automatic pass through. Indeed, it would seem that the concerns were identical. The House Report indicates that the subsection (e)(1) automatic increase was intended to "allow the [cable] operator to adjust for inflation without being subject to city approval." House Report at 25, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4662.[36] The FCC's rule is designed to account for increases in costs faced by the cable operator, such as "the price of programming . . . and copyright fees." *Report and Order*, 50 Fed. Reg. at 18,655. It seems reasonable to believe that these increased costs will be due to inflation.

But regardless of whether the motivations underlying the two rules are identical, it is unquestionable that they serve the same purpose. Functionally, therefore, the FCC has simply removed the five-percent cap that Congress placed on automatic increases. Far from justifying its actions in light of a specific statutory provision covering the same subject, the Commission's only reference to section 623(e)(1) is to say that under the Commission's automatic pass-through provision "rate increases may be taken in addition to the 5% automatic annual increase to which most cable systems are entitled." *Id.*

In our view, the Commission's establishment of the automatic pass through was contrary to law. Indeed, counsel for the FCC conceded as much at oral argument. Congress had already addressed the question; it conferred

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[36] We employ legislative history here not to contradict the clear words of the statute, as the FCC has sought to do, *see* pp. 38-39, *supra*, but to supplement our understanding of the concerns motivating Congress to include a particular provision. It cannot be gainsaid that ours is a far more traditional —and much more reasonable—use of legislative history.

no power upon—and left no room for—the FCC to weigh in with an automatic increase of its own. This act of gratuitous administrative largesse cannot stand.

3. *Signal Availability Standard*

Having decided to define "effective competition" for purposes of section 623(b) by reference to the number of "off-the-air" broadcast signals that were available in the cable community, *see* pp. 20-21 *supra*, the Commission was naturally required to determine how to measure when a signal should be considered "available." Accordingly, in the *Report and Order*, the FCC decided that

> a signal will be counted for purposes of effective competition if it places a predicted Grade B contour *over any portion* of the cable community or is significantly viewed within the cable community.

Report and Order, 50 Fed. Reg. at 18,651 (emphasis added; footnote omitted).

Several parties, most notably an intervenor, the City of Dubuque, Iowa, attack this standard as arbitrary and capricious both in its use of the Grade B contour and "significantly viewed" measures, and in the precise manner in which the FCC has crafted the standard. We are constrained to conclude that the Commission has erred in fashioning the standard; inclusion of the language italicized above is arbitrary and capricious.

As noted earlier, *see* notes 8 & 9 *supra*, the measures of signal availability chosen by the Commission are highly imperfect—the fact that a particular house falls within the Grade B contour of a station does not mean that that station can in reality be picked up on a television set in that house. For example, the City of Winona, Minnesota complained to the Commission that the Grade B measure was particularly inaccurate when applied to it, because while the City

> is supposed to be receiving four Grade B signals . . . in reality, the City of Winona lies nestled in a valley

> surrounded by bluffs which rise to a height of 550 to 575 feet which significantly interfere with the ability to receive three of the four Grade B signals.

Joint Appendix ("J.A.") at 116. While practical difficulties such as these certainly should have been weighed in the balance by the FCC, they are not of great concern in and of themselves. The FCC properly considered ease of application in selecting its standard, *see* House Report at 66 ("FCC should establish objective nationwide criteria which are readily applicable"), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 4703; *cf. Ashland Exploration, Inc. v. FERC*, 631 F.2d 817, 822 (D.C. Cir. 1980) (agencies "may rationally turn to simplicity . . . and administrative convenience"), and the standard chosen by the agency bears a reasonable relationship to actual signal availability. *See Tele-Media Corp. v. FCC*, 697 F.2d 402, 404 n.4 (D.C. Cir. 1983) (referring to the Grade B contour as an indicator for "satisfactory off-the-air viewing"); *cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.) (agency must "demonstrate a 'rational connection between the facts found and the choice made'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)), *cert. denied*, 434 U.S. 829 (1977). Moreover, while the Commission candidly admits that its selected measures are only theoretical indictors and will lead to errors in practical application, *Report and Order*, 50 Fed. Reg. at 18,651, it cannot be gainsaid that *no* measure of signal availability is an error-free indicator of actual signal reception. *Cf.* FCC Brief at 17. Thus, use of the Grade B contour and "significantly viewed" measures is not in itself problematic, much less arbitrary and capricious; the problem lies in the manner in which the Commission has incorporated these measures into its signal availability standard.

Because the Commission knew it was dealing with the theoretical and appreciated the practical flaws inherent in its chosen measures, it was incumbent upon the FCC to

craft the standard more carefully, to ensure that a signal is at least theoretically available over the entire cable community or at least some significant portion of the cable community. The failure to do so could predictably lead, under the FCC's current rules, to irrational results —that is, a cable system could be labeled as subject to effective competition due to the presence of three broadcast signals even though at no point within the cable community are all three signals even theoretically available.

The FCC's response to these admitted difficulties with its approach—which is, after all, central to the entire determination of whether effective competition exists—is essentially to throw up its hands. The Commission emphasizes the truism that no standard is perfect and that the agency has included a waiver provision to address problems such as those we have identified. *See* FCC Brief at 39. As discussed above, we accept the proposition that no reasonable measure of signal availability is foolproof. We also agree that, to a point, a waiver procedure is adequate to address inherent difficulties with whatever standard is chosen.[37] For example, a waiver proceeding would be appropriate to address a claim that while three Grade B contours theoretically covered the entire cable community, in reality only two off-the-air signals were available. What we cannot accept is the FCC's enormous margin of error created by its decision to "count" *every* signal that covers "*any* portion of the cable community." *Report and Order*, 50 Fed. Reg. at 18,651 (emphasis added).

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[37] Because *any* standard will lead to errors in application, we would expect that the Commission will make appropriately flexible use of its signal availability waiver procedures. In this regard, we note with concern the substantial barrier the current waiver system may place on franchising authorities. *See generally* Brief of Intervenor City of Dubuque, Iowa at 19; Reply Brief for Intervenor City of Dubuque, Iowa at 5-7. This is an area the Commission would be well-advised to deem fruitful for further study on remand.

This remarkable standard is nowhere explained in the *Report and Order*, nor does the *Report and Order* reflect any awareness of the practical ramifications of this decision. What is more, the *Report and Order* fails to discuss why the "any portion" standard was selected over a more refined geographical qualification, such as "a significant portion of the cable community," or "over 75 percent of the cable community." This type of undifferentiated rulemaking is fundamentally flawed.[38]

Accordingly, we are persuaded that the FCC's signal availability standard is arbitrary and capricious; we therefore remand that issue to the agency for a reasoned explanation of its chosen standard or the development of a new standard.

B. *Franchise Fees*

In accordance with our holding in *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986), we have permitted Yakima and CCTA to intervene in this suit for the purpose of challenging the FCC's policy of "forbearance." In its *latest* formulation, that policy can be summarized as follows: The Commission *does* have jurisdiction to adjudicate disputes arising under the

[38] While our discussion has focused on the Grade B prong of the Commission's signal availability test, and we have found the errors there more than sufficient to invalidate the standard as arbitrary and capricious, we note that there are also potential difficulties with the application of the "significantly viewed" prong. As we have discussed, *see* note 9 *supra*, the "significantly viewed" determination relies upon statistics reflecting the percentage of viewers in a community watching a particular channel. Dubuque complains that these "significantly viewed" statistics are collected on a county-by-county basis, a geographic designation that will not necessarily correlate with cable communities. For example, Dubuque indicates that it lies in the extreme eastern portion of its county and that the county is some thirty times the size of the city. Moreover, the relevant broadcast signals originate to the west of the county. Thus, Dubuque claims, the "significantly

Cable Act's franchise fee provision, although its jurisdiction is concurrent with that of the courts. The Commission will exercise its jurisdiction only where the dispute directly impinges on a national policy concerning cable communications and implicates the agency's expertise. *See Reconsideration*, 60 Rad. Reg. 2d (P & F) at 518. Where the dispute concerns a matter of local taxation, the FCC generally will *not* assert its jurisdiction, because the dispute's relevance to a national communications policy will tend to be "slight" and the Commission's expertise will tend not to be implicated. *Id.* at 519. In these cases, the Commission will refer the dispute to "local courts," which are, in the Commission's judgment, better situated to take evidence and delve into matters of local taxation. *Id.* at 518-19.

Reviewing its latest formulation, we are unable to conclude that the FCC's policy of forbearance is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1982). In contrast to several other provisions of the Cable Act,[39] the franchise fee provision does not contain an explicit delegation of regulatory authority. Because the provision establishes a *uniform federal standard* for franchise fees,

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viewed" statistics for the county do not accurately reflect the percentage of viewers watching within the city, because a large portion of those watching may be located in the western portion of the county. These western viewers located outside the Dubuque cable community, the argument goes, severely skew the county-wide "significantly viewed" statistics, rendering those statistics incapable of providing meaningful information about "significantly viewed" stations within the Dubuque cable community. The FCC's response is essentially that the possibility of waiver cures any such problem. But waiver provisions cannot do service for reasoned decisionmaking. In any event, we need not resolve at this stage such potential flaws with the application of the "significantly viewed" prong, in light of our conclusions with respect to the Grade B prong.

[39] *See* note 4 *supra*.

and because the provision has been incorporated into the Communications Act, it is clear—as the FCC implicitly recognized in *Reconsideration*—that the *ultimate* responsibility for ensuring a "national policy" with respect to franchise fees lies with the federal agency responsible for administering the Communications Act. At the same time, however, the statute also appears to contemplate judicial enforcement of the franchise fee provision, as evidenced by the reference to "court action" in section 622(d), 47 U.S.C. § 542(d).[40] In the absence of more explicit guidance from Congress, the FCC necessarily enjoys discretion in setting its enforcement priorities and identifying those franchise fee disputes that require Commission action.

In the instant case, it cannot be said that the Commission abused its discretion. It was reasonable for the Commission to conclude that the typical franchise fee dispute does not directly impinge on a "national policy concerning cable communications." It was also reasonable for the Commission to conclude that its expertise does not extend to certain questions, such as whether a local tax is "unduly discriminatory" against cable operators and hence a "franchise fee" under the definition provided in the statute. *See* § 622(g)(2)(A), 47 U.S.C. § 542(g)(2)(A). We will not substitute our judgment on

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[40] Section 622(d) provides that "[i]n any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees." This cross-reference to a "court action" arising under subsection (c) does not by its terms suggest that court actions are maintainable under *other* portions of § 622. It is possible to draw such an inference, however, from the fact that subsection (c) does not itself create an express cause of action. The cross-reference to a "court action" that is *not explicitly authorized* by the statute strongly suggests an assumption by Congress that courts would have jurisdiction to enforce § 622. Had Congress explicitly created a cause of action *only* under subsection (c), the inference would of course run in the opposite direction.

these matters for the Commission's judgment, absent evidence that the Commission acted irrationally or in contravention of the statute. Finding no such evidence in the Commission's final order, the Cable Act, or the legislative history, we affirm the Commission's policy as announced in *Reconsideration.*

Our affirmance of the Commission's policy, however, is based on our assessment that the Commission has *not totally abdicated its ultimate responsibility* for enforcing the franchise fee provision. *Cf. Adams v. Richardson,* 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (allegation that agency "consciously and expressly" adopted a "general policy" resulting in an abdication of its statutory duties). The Commission recognized in *Reconsideration* that one of the primary purposes of the Cable Act was to establish a "national policy" concerning cable communications, and that as part of this policy Congress chose to adopt a *federal standard* to govern the level of franchise fees. In recognition of these facts, the Commission reversed its course from its prior pronouncements suggesting total forbearance. First, it explicitly found that it *did* have jurisdiction over franchise fee disputes and *would* adjudicate such disputes where necessary to the achievement of congressional goals. Second, it implicitly acknowledged, we think, its responsibility to monitor judicial enforcement of the franchise fee provision and to assert its jurisdiction should inconsistent judicial interpretations threaten to undo the uniformity Congress sought to achieve in establishing a federal standard for franchise fees. With these marked shifts in policy, the Commission has made clear that it stands ready to enforce the franchise fee provision where circumstances require Commission intervention. We are thus able to affirm the Commission's policy without fear that Congress' efforts to establish a federal standard for franchise fees will be thwarted.[41]

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[41] As a final caveat, we observe that the FCC's policy of partial "forbearance" is predicated on the assumption that

C. *FCC Interpretative Rules—Leased Access, Lock Box and Income Neutral Service* [42]

As part of the *Report and Order*, the FCC issued three rules here challenged by petitioners. The rules interpret

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actions to enforce the franchise fee provision are maintainable in either federal or state courts. *See Reconsideration*, 60 Rad. Reg. 2d (P & F) at 517-19; *see also* note 40 *supra*. The FCC's policy will be drawn into serious question if this assumption should prove erroneous.

[42] The Administrative Procedure Act exempts "interpretative rules [also known as interpretive rules], general statements of policy, or rules of agency organization, procedure, or practice" from the procedural requirements of notice and comment rulemaking. 5 U.S.C. § 553(b)(A) (1982). While the distinction between nonbinding interpretative rules and binding legislative rules in a given case can be "enshrouded in considerable smog," *Community Nutrition Institute v. Rogers*, No. 84-5223, slip op. at 4 (D.C. Cir. May 15, 1987) (internal citations omitted), it is at least generally understood that "an interpretative rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties," *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1079 (1985) (internal citation omitted), whereas legislative rules affect "the manner and circumstances in which the agency will exercise its plenary power," *id.*, and impose "a presently binding norm," *Community Nutrition*, slip op. at 8. *See also National Latino Media Coalition v. FCC*, No. 83-1785, slip op. at 7-8 (D.C. Cir. Apr. 28, 1987) (distinguishing between interpretative and legislative rules).

We have no occasion to dispute the uniform assumption of the parties that all three rules are interpretative. By essentially incorporating the exhaustion doctrine, *see Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 706-07 (D.C. Cir. 1985), section 405 of the Communications Act, 47 U.S.C. § 405, would seem to preclude invalidation of the challenged rules as legislative rules promulgated without notice and comment, as no party raised such a challenge before the agency. *Cf.* Brief for Petitioners ACLU, *et al.* at 4, 6 (referring to the rulings as "interpretive") ["Brief for ACLU"].

Furthermore, the classification of the provisions has no effect on our ruling. The leased access rule is unripe for

the terms and conditions of leased access by third parties to cable operator systems ("leased access"), section 612, 47 U.S.C. § 532; an obligation to make available electronic boxes capable of blocking incoming channels in the home ("lock boxes"), section 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A); and a proviso that system installation not discriminate based on income ("income neutral service"), section 621(a)(3), 47 U.S.C. § 541(a)(3).

We hold the leased access rule unripe for review. A delay in adjudication would not impose a cognizable hardship under controlling precedent, nor is the rule fit for review. For reasons of judicial economy, we reach the merits of the remaining two rules and find that the agency arbitrarily excluded a subset of channels from lock box control. The service rule harmlessly restates the statutory obligation prohibiting discrimination on the basis of income.

1. *Leased Access*

a. Section 612

Section 612, 47 U.S.C. § 532 (leased access), is a lengthy provision designed "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. § 532(a). Operators of high capacity cable systems with thirty-six or more channels must designate from ten to fifteen percent of the channels for commercial use via leased access by "persons unaffiliated with the operator" (*i.e.*, third party programmers). 47 U.S.C.

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review, whether or not interpretative. The lock box provision exceeds FCC statutory authority, even if independently defective for failure to abide by notice and comment rulemaking. The income neutral service provision, found to restate harmlessly the statutory obligation, precludes a finding that notice and comment rulemaking is required.

§ 532(b). Commercial use "means the provision of video programming, whether or not for profit." 47 U.S.C. § 532(b)(5)(B). Subsection (c) states that "the cable operator shall establish, consistent with the purpose of this section, the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." 47 U.S.C. § 532(c). Aggrieved parties can go to district court for relief, 47 U.S.C. § 532(d), and to the Commission "upon a showing of prior adjudicated violations of this section." 47 U.S.C. § 532(e). Ultimately, the FCC is authorized to "promulgate any additional rules necessary to provide diversity of information sources," but only after high capacity cable systems (thirty-six or more channels) are available to seventy percent of U.S. households and subscribed to by seventy percent of the households to which such systems are available. 47 U.S.C. § 532(g).

b. The Interpretative Rule

Petitioners challenge the following FCC interpretation of section 612:

> We find no basis either in the legislative history or in the Cable Act that would require cable operators to afford mandatory access to control systems [such as computer systems and associated hardware] by third party commercial channel leasees. However, to the extent that a cable system deliberately configures itself technically to preclude commercial access, such action would likely be viewed as a direct attempt to thwart Congressional intent and could result in sanctions being imposed by a court of competent jurisdiction.

Report and Order, 50 Fed. Reg. at 18,642.

The *Report and Order* comment responded to the clarification sought by two cable operators (Western Communications, Inc. and Gill Industries) as to whether a chan-

nel leasee could demand access to the computer systems and associated hardware (the "control system") used by "addressable" cable systems.[43] The operators believed mandatory access to the control system would not be reasonable under section 612(c). By contrast, the ACLU alleges that access to a control system is the "lifeblood" of third party programmers, particularly if they seek to offer pay-per-view television. Supplemental Brief for ACLU at 7; Brief for ACLU at 20-21.

In briefing the issue on the merits, the National Cable Television Association asserts that allowing access to the control system might also give access to confidential proprietary information, depending on the precise technical configuration of the system. *See* Brief for Intervenors National Cable Television Ass'n, *et al.* at 50-51. The ACLU responds that such advanced systems "surely" must be capable of a configuration protecting proprietary information. *See* Reply Brief for ACLU at 7.

For its part, the FCC, in its supplemental brief, emphasizes that the interpretative rule is "an extremely limited pronouncement that a cable operator is not required in every case to make its computer hardware and software available to a cable programmer, irrespective of the intrusion into the cable operator's proprietary information." Supplemental Brief for Respondents at 7. The FCC further notes that the ruling "appears to be limited to those systems which are addressable and which already have in place computer software that does not permit the cable operator to shield its proprietary information from potential third party users." Supplemental Brief for Respondents at 2-3. It is conceded that the FCC has not

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[43] According to the FCC, an addressable cable system is one in which "each converter/descrambler is normally controlled by a central computer which uses an integrated program to authorize program choices, automatically generate billing information, and produce reports and accounts for the cable system." Supplemental Brief for Respondents at 2.

yet applied its interpretation in a particular case. Indeed, the FCC says that "it is unknown how many cable systems, if any, fall into this category." Supplemental Brief for Respondents at 3.

c. Ripeness

The ripeness determination is governed by the well-worn principles of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and its companion cases, *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967), and *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167 (1967), which require courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149.

Review of the leased access rule satisfies the basic fitness requirement that a purely legal issue be framed. *See, e.g., Baltimore Gas & Electric Co. v. ICC*, 672 F.2d 146, 149 (D.C. Cir. 1982) ("[T]he issue tendered is a purely legal one: whether the statute was properly construed by the [Commission].") (quoting *Abbott Laboratories*, 387 U.S. at 149). In addition, the case satisfies a collateral fitness requirement that the action under review constitute final agency action. *Id.* ("Nor do we consider review excluded for lack of a final agency decision or simply because the order in question is 'interpretive.'" (citation omitted)).

But fitness for review is not satisfied when "judicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application of this [interpretative rule] than could be the case in the framework of the generalized challenge made here." *Toilet Goods Ass'n v. Gardner*, 387 U.S. at 164 (1967). Obviously, neither the parties nor the court can predict whether the technical configuration of a particular control system will successfully prevent access to proprietary information. More-

over, the extent of the burden, if any, imposed by the present rules can only be assessed in a specific context. Thus, pursuant to *Toilet Goods*, petitioners' challenge is not fully fit for review.

Petitioners' claim also fails the hardship test, which in its essence requires that the challenged action impose a non-speculative hardship on the parties if court consideration is delayed. *See id.* at 164.

Petitioners allege that the interpretative ruling affects cable operators and independent programmers in their day-to-day operations, thus meeting the hallmark test of hardship. In particular, they claim independent programmers will be forced to obtain access through more costly and less competitive means. *See* Supplemental Brief for ACLU at 8 ("The Commission's ruling thus places unaffiliated cable programmers at 'an acute competitive disadvantage'—precisely the type of injury that makes Petitioners' challenge ripe for review." (citation omitted)).

Although the Commission says this burden falls within the statute's contemplation, the argument is properly addressed on the merits. It does not undermine the potential hardship for purposes of ripeness. Nonetheless, resolution of the ripeness issue is not difficult. Interpretative rules as a general matter raise ripeness concerns, given that questions often arise as to the binding effect of the rule, the absence of immediate enforcement, and the need for further factual development. *See, e.g., Tennessee Gas Pipeline Co. v. FERC*, 736 F.2d 747, 751 (D.C. Cir. 1984) ("Were we to entertain anticipatory challenges [to an interpretative rule change] pressed by parties facing no imminent threat of adverse agency action, no hard choice between compliance certain to be disadvantageous and a high probability of strong sanctions, *see Arkansas Power & Light Co. v. ICC*, 725 F.2d at 726, we would venture away from the domain of judicial review into a realm more accurately described as judicial pre-

view."); *see also South Carolina Electric & Gas Co. v. ICC*, 734 F.2d 1541, 1545-46 (D.C. Cir. 1984); *Baltimore Gas & Electric Co.*, 672 F.2d at 149.

Interpretative rules *yet to be applied* sharply intensify the difficulties generally besetting such challenges. The abstractness of the challenge is highlighted. The agency's willingness to enforce its apparent construction of the statute cannot be fixed. The present effect on the parties is necessarily speculative. *See, e.g., Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 772 (D.C. Cir. 1984), *cert. dismissed*, 106 S. Ct. 22 (1985) ("We accept the Commission's characterization of Order No. 303 as an interpretive rule that, of its own force, creates no law and binds neither the public, the agency, nor the courts. It follows that if Order No. 303 had never been applied in a particular case it would be unreviewable." (citation omitted)). Most recently, this court, pursuant to the general principles of *Toilet Goods*, found unripe for review the yet-to-be-applied interpretative rule from the FCC that a lottery may be used to break a tie in a comparative license hearing. *National Latino Media Coalition*, No. 83-1785 (D.C. Cir. Apr. 28, 1987). This reluctance to engage in premature review is also longstanding: "Only the strongest showing of the immediate and inescapable effect of the mere announcement of the [agency's] interpretation . . . would suffice to advance review to the abstract stage at which it is now being sought." *National Ass'n of Insurance Agents, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 489 F.2d 1268, 1271 (D.C. Cir. 1974).

The challenge to the leased access rule does not pass muster under these guiding principles. We do not know who precisely will be affected. As noted by the FCC, "there has been no showing that any cable programmer has been denied access to any cable system as a result of the ruling, nor has it even been shown that any cable

programmer has been dissuaded from seeking access because of the Commission's ruling." Supplemental Brief for Respondents at 5. We do not know if the FCC will follow the gloss it presents to the court in its brief. The classical justifications for pre-enforcement review are absent, *i.e.*, petitioners are not put to the test of compliance or exposure to lawsuit, *see, e.g., Tennessee Gas*, 736 F.2d at 751, nor is a specified activity *imposed* on a party, *id.* At this stage, the burden is more like that found to be minimal in *Toilet Goods*, 387 U.S. at 164 (1967) (agency action unripe when regulation insufficiently affects primary business conduct and no "irremediable adverse consequences flow from requiring a later challenge"). Furthermore, we are not foreclosing review, but instead forestalling judicial inquiry until the controversy can take on a better-defined focus. The Cable Act explicitly grants district courts the authority to decide, on a case-by-case (and thereby fact-specific) basis, whether the "price, terms, and conditions" of commercial access are reasonable. *See* 47 U.S.C. § 532(d); *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 250-51 (D.C. Cir. 1986) (choice between addressing the challenge in the present setting or permanently withholding review).

Petitioners cite to *American Fed'n of Gov't Employees v. FLRA*, 750 F.2d 143 (D.C. Cir. 1984), for the proposition that agency action foreclosing a present statutory entitlement constitutes hardship in the proper circumstances. Supplemental Brief for ACLU at 6. The case is inapposite because no claimed statutory entitlement to leased access in a specific case has been "firmly and finally rejected" by the agency, nor has the rationale been applied "to a number of cases." *American Federation*, 750 F.2d at 145.

Also inapposite is *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*,

429 U.S. 862 (1976), where the court held ripe for review an interpretative ruling by the Comptroller of the Currency permitting national banks to install automated teller machines on thirty days' notice and "without reference to, or limitation by, state laws regulating or prohibiting branching by state-chartered banks." *Id.* at 926. Absent a ruling on the merits, state-chartered banks would have been immediately subject to "acute competitive disadvantage" pending the outcome of the litigation, *id.* at 929, the legal issues were "sharply defined," and the Comptroller had adopted "a definitive position . . . not likely to change," *id.* at 930. As noted, the legal issue here cannot be fully defined absent specifics. More important, no similar imminent action is alleged, or can be inferred, to follow hard on the heels of the FCC's leased access rule.

In sum, this circuit has spoken directly to the issue of interpretative rules. Absent exigent circumstances, such as the impending proliferation of automated tellers in *Smith*, or special circumstances, such as an adjudication presenting no threat whatsoever to the "basic rationale" of the ripeness doctrine, *i.e.*, "premature adjudication" or "judicial interference [with] an administrative decision," *Abbott Laboratories*, 387 U.S. at 148, we decline to consider the leased access rule ripe for review when it has yet to be applied.[44]

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[44] We find the lock box and service rules to be ripe for review at this time because they meet this latter test. The FCC itself seeks a prompt adjudication on the merits, and hence there is no threat of untimely interference in agency decisionmaking, *see Abbott Laboratories*, 387 U.S. at 148, and petitioners' challenges to the rules "present[] purely legal questions, the understanding of which neither requires nor is facilitated by further factual development." *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 92 (D.C. Cir. 1986). This is in contrast to the petitioners' abstract challenge to the FCC's leased access rule, where the agency directly contests the ripeness of the action and the validity of the

2. *Lock Box*

Section 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A), the lock box provision, states:

> In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

In the *Report and Order*, the FCC opined in pertinent part that

> [w]e also believe that we should clarify the cable operators' responsibilities with respect to this provision. Thus, we believe that the cable operator must provide, upon subscriber request, by sale or lease, a lockbox for any channel over which it has editorial control. (*This would exclude commercial access, PEG* [*public, educational, and governmental*] *and must-carry channels*).

Report and Order, 50 Fed. Reg. at 18,655 (emphasis added).

The FCC makes only a faint-hearted attempt to justify the exclusion of select stations from lock box control. In its brief, it expressly declines to address the issue, relying exclusively on the explanation presented in the *Report and Order*. Brief for Respondents at 49 n.36. Yet nowhere in the *Report and Order* does the FCC support its conclusion that the lock box obligation applies only to those channels within the cable operator's editorial con-

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rule cannot be determined in advance of actual application. *See id.* at 95 (distinguishing *Webb v. HHS*, 696 F.2d 101 (D.C. Cir. 1982), where the challenge to the agency rule was found to be "uniquely fact-based"). Considerations of judicial economy properly prevail in the present circumstances because we are dealing with prudential, not constitutional, aspects of the ripeness doctrine.

trol. We are inclined to construe this record as an implicit concession by the agency that it cannot justify the exclusions. In any event, we find that the FCC exception has no discernible basis in the statute or the legislative history, and, therefore, we direct the FCC to delete the improper suggestion that lock boxes need not be capable of blocking selected channels.

3. *Income Neutral Service*

Section 621(a)(3), 47 U.S.C. § 541(a)(3), imposes a duty to avoid discriminatory access to cable service based on income:

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

This language goes no further than to require that service not be denied to low income subscribers, a practice known as redlining. Nonetheless, the FCC initially interpreted this section in the Notice of Proposed Rulemaking to mean that "the franchising authority shall require that *all* areas of the franchised area be wired." *Notice of Proposed Rulemaking*, 49 Fed. Reg. at 48,769 (emphasis added). In the *Report and Order*, however, the FCC reversed field. Noting the complaints lodged by cable operators, it concluded that

> [T]he intent of [section 621(a)(3)] was to prevent the exclusion of cable service based on income and that this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area.

Report and Order, 50 Fed. Reg. at 18,647.

A comparison of the *Report and Order* commentary with the statute reveals no significant variation. The

FCC comment amounts to a legally insignificant prose restatement of the statutory obligation. Petitioners in essence do not contest this point, but challenge instead the reversal of the initial suggestion that section 621(a)(3) mandates universal service. The principal support for this argument is found in the following language from the House Report:

> In other words, cable systems will not be permitted to "redline" (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice.

House Report at 59, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 4696.

We do not agree that the interpretative ruling conflicts with congressional intent. The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service. The agency ruling explicitly reaffirms the prohibition against redlining emphasized by the House report. The ACLU argues that the committee report evidences congressional intent that as a practical matter one can only deal with redlining by wiring "all areas of the franchise." Otherwise "an endless variety of 'facially neutral' excuses [could] be used by cable operators to deny cable service to 'unprofitable' parts of a community." Brief for ACLU at 25. We hold that this one sentence from the committee report cannot reasonably be read to so drastically limit the agency's interpretation of the scope of its discretion in accomplishing the legislative goal. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 598 (1981) ("The legislative history of the Act . . . provides insufficient basis for invalidating the agency's construction of the Act."); *cf. supra* II.A.1. at 36-39. Rather, we read the sentence to require exactly what it says: "wiring of all areas of the franchise" *to prevent redlining.* However, if no

redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited. This is precisely the statement made in the interpretative ruling. It wholly conforms to the statute and the explication in the House report. We therefore uphold the comment as fully consistent with clear congressional intent.

D. *Guam*

Guam is an island thirty miles long, four to eight miles wide, that is located 9,000 miles from Washington, D.C. and 3,700 miles from Hawaii. The island's 100,000 inhabitants are served by two full-time television broadcast facilities, a microwave television station, six radio stations, and the Armed Forces station. It is also served by Guam Cable TV ("Guam Cable"), operator of a thirty-six channel cable system. Due to its distance from the mainland, Guam Cable videotapes over-the-air and satellite-delivered programming at a facility in Pasadena, California and flies the tapes daily to Guam. *See generally* Brief for Petitioner Guam Cable at 4-6.

Under the FCC's definition of "effective competition," 47 C.F.R. § 76.33(a)(2) (1986), Guam Cable will be subject to basic rate regulation because the island is served by fewer than three over-the-air broadcast signals. Guam Cable contends the island nonetheless is subject to effective competition and therefore should be exempted from rate regulation. *See* 47 U.S.C. § 623(b) (exempting cable systems subject to effective competition from rate regulation). In light of the unique conditions prevailing on the island, Guam Cable filed comments and reply comments requesting that the FCC promulgate an alternative definition of effective competition for cable systems operating in unique and isolated markets. J.A. at 335-52, 467-68. The FCC failed to respond to the comments.

Guam Cable appeals on the grounds that it was arbitrary and capricious for the FCC to ignore Guam's re-

quest for special treatment.[45] The FCC responds, in its brief, that it cannot be faulted as a legal matter for not responding to every one of the 140 comments and sixty-three reply comments received from various interested parties. Brief for Respondents at 49. Moreover, the FCC points out that Guam Cable is free to avail itself of the general waiver provision pursuant to section 76.7 of the Commission's rules, which states in pertinent part:

> (a) On petition by a cable television system operator, a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

47 C.F.R. § 76.7 (1986).

Notice and comment rulemaking procedures obligate the FCC to respond to all significant comments, for "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Alabama Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)). In determining whether a particular issue is significant, this court has emphasized that "the 'arbitrary and capricious' standard of review must be kept in mind." *Home Box Office*, 567 F.2d at 35 n.58. As applied to the present facts, the question before

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[45] We note and reject Guam Cable's various formulations of its complaint, including the arguments that the Guam request obligated the FCC to respond pursuant to the requirement to "incorporate in the rules adopted a concise general statement of their basis and purpose," 5 U.S.C. § 553(c) (1982); and that the Commission violated its own rule requiring it to "consider all relevant comments and material of record before taking final action in a rulemaking proceeding . . . ." 47 C.F.R. § 1.425 (1986). The actual issue, which is addressed above, turns on whether the FCC discharged its obligation to respond to all significant comments.

us is whether the FCC arbitrarily and capriciously ignored Guam's request for a special, uniquely tailored exception.

Significantly, Guam Cable sought relief *for Guam Cable alone*, not cable operators located in remote and isolated areas in general. J.A. at 335-52. Thus, although Guam Cable asked for relief in terms of modification of the definition of effective competition, J.A. at 350, it is beyond cavil that the nature of relief it sought was in substance a waiver, not a general rule. Pursuant to circuit precedent, this factor alone would make it extremely difficult to categorize the agency's failure to respond as "arbitrary and capricious." *See id.* ("Thus only comments which, if true, raise points relevant to the agency's decision *and which, if adopted, would require a change in an agency's proposed rule* cast doubt on the reasonableness of a position taken by the agency [that a comment is not significant]." (emphasis added)).

Added to this is the statutory obligation confronting the FCC to promulgate regulations within 180 days from enactment of the Cable Act, 47 U.S.C. § 543(b)(1), thereby obligating the agency—in less than half a year—to give notice of the rulemaking, absorb and respond to all significant issues raised in the 140 comments and sixty-three reply comments, and in fact issue regulations affecting the operation of cable television nationwide on every central issue, from rate regulation to the appropriate allocation of authority among federal, state and local regulators. Many agencies, it bears noting, have at times achieved far less in far longer time. In this context, the call for a special exception by Guam does not constitute an "arbitrary and capricious" failure to respond to a significant issue raised in the notice and comment process.

Finally, we note that the presence of the waiver provision insures that operators facing unique market circum-

stances such as Guam Cable have an available avenue of relief. Indeed, the FCC specifically committed itself to entertain a petition for waiver of rate regulation in the Guam market "[i]f and when Guam Cable can show that the general rules on rate regulation manifest an unfair hardship—it has yet to show that the regulated rates are inadequate . . . ." Brief for Respondents at 49. The agency cannot rest on this defense because it nowhere cited the waiver in the *Report and Order*. Even if the agency's oversight reflected an excessive familiarity with its own rules, post hoc rationalizations cannot excuse the agency from its legal obligation to respond to all significant issues. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

In an ideal world, the FCC ought to have responded to the relief earnestly put forward by Guam Cable. While we cannot accept the argument that a statutory provision exempting Guam from certain copyright laws mandates special treatment under the Cable Act, J.A. at 343, we underscore that the obligation to respond to significant comments represents the legally enforceable minimum. Given the incontestable power of agencies today, it would behoove them to exercise all reasonable energies to respond, even if briefly, to the comments of parties such as Guam, who in this case presents a potentially legitimate claim of exceptional circumstance. As a legal matter, however, given the precise setting of the rulemaking required and the special relief sought, we cannot say that the FCC violated its lawful obligation to respond to significant comments.

III. Conclusion

For the reasons set forth above, the orders of the FCC are affirmed in part and reversed and remanded in part.

So ordered.

EDWARDS, *Circuit Judge*, concurring: I concur in the opinion in Part II.C, but I wish to clarify the basis upon which we have resolved the issues posed. My principal concern with this section is that it may mistakenly be read to suggest that there is some general principle that interpretive rules yet to be applied are unripe for review. There is no circuit law to support such a suggestion, and we do not so hold in this case. It may be true that "[i]nterpretative rules as a general matter raise ripeness concerns," but there is no fixed principle that interpretive rules yet to be applied are not subject to judicial review. Indeed, if the parties challenging an agency's interpretive ruling have standing, and there is a case or controversy for Article III purposes, then there is a *presumption* of judicial review under the APA. *See* 5 U.S.C. §§ 702, 704 (1982).

Of course, this court may, as a *prudential* matter, defer its review of an agency's interpretive rule where institutional interests favor deferral and the petitioners are unable to demonstrate sufficient "hardship" to outweigh those interests. Recently, this court summarized the prudential aspects of the ripeness doctrine as follows:

> [In its prudential aspects] . . . the ripeness inquiry takes into account pragmatic concerns regarding "the institutional capacities of, and the relationship between, courts and agencies." These concerns include "the agency's interest in crystallizing its policy before that policy is subjected to judicial review," "the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting," and "the petitioner's interest in prompt consideration of allegedly unlawful agency action." In *Abbott Laboratories*, the Supreme Court announced the two-pronged test for ripeness that balances these interests. The test requires a court to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

> Pursuant to the "fitness of the issues" prong, we first must decide whether the disputed claims raise purely legal questions and would, therefore, be presumptively suitable for judicial review. Second, we determine whether the court or the agency would benefit from the postponement of review until the agency action or policy in question has assumed either a final or more concrete form. Finally, we examine the appellants' interest in immediate review. In order to outweigh any institutional interests in the deferral of review, appellants must demonstrate "hardship," *i.e.*, that "the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs."

Better Gov't Ass'n v. Department of State, 780 F.2d 86, 92 (D.C. Cir. 1986) (footnotes omitted); *see also Eagle-Picher Indus. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985).

I agree that, under these principles, the leased access rule is not yet ripe for review, whereas the lock box and service rules are ripe. I write separately only to emphasize that we reach this result through application of these well-established ripeness principles.

STARR, *Circuit Judge*, dissenting in part: I am in full agreement with my colleagues, save for one point. In my view, the Commission's recrafted definition of "basic cable service" enjoys sufficient warrant in the legislative history to pass muster, where, as here, the statute does not speak with absolute crystalline clarity. *See* Opinion at 39 n.34. That is to say, Congress has chosen, wisely or no, to speak to the precise issue at hand through a Committee Report that was expressly adopted by both Houses. *See id.* at n.33. I would heed this Congressional voice and accordingly uphold the Commission's redefinition of "basic cable service."

Under more typical circumstances, where a mere Committee Report, lacking the authoritativeness of the House Report at issue here, was being pressed into service in an effort to override statutory language, I would be quick to agree with my colleagues' understandable refusal to permit that which is not law to triumph over that which was duly passed by Congress and signed into law by the President. We in the judiciary have become shamelessly profligate and unthinking in our use of legislative history, a regrettable fact of contemporary judicial life in the face of powerful voices of warning from the not-so-distant past, *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319-21 (1953) (Jackson, J., concurring), as well as a growing number of voices in the present-day wilderness, *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 107 S.Ct. 1855, 1859-60 (1987); *Abourezk v. Reagan*, 785 F.2d 1043, 1054 n.11 (D.C. Cir. 1986); *Hirschey v. FERC*, 777 F.2d 1, 7-8 & n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

But in this instance, I would defer to Congress' expression of intent in the relevant Committee Report under the unusual circumstances here, where the statute, as the majority candidly acknowledges, *see id.* at 39 n.34, admits of some ambiguity; where the Report speaks clearly on the precise question at issue; and where the

Report was expressly considered and adopted by both Houses. Having so concluded, I nonetheless find myself in spiritual accord, as it were, with the reasoning and the result reached by my colleagues, and set down these few words of mildest dissent only with the greatest reluctance.

RELEVANT STATUTE CABLE COMMUNICATIONS POLICY ACT OF 1984 (RELEVANT PORTIONS)

PUBLIC LAW 98-549--OCT.30, 1984
[98 STAT.2779]

Public Law 98-549
98th Congress

An Act

[Oct. 30, 1984 [S. 66]]
To amend the Communications Act of 1934 to provide a national policy regarding cable television.

[Cable Communications Policy Act of 1984]
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; TABLE OF CONTENTS

[47 USC 609 note.]
Section 1. (a) This Act may be cited as the "Cable Communications Policy Act of 1984".

(b) The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Amendment of Communications Act of 1934.

"TITLE VI--CABLE COMMUNICATIONS

"Part I--General Provisions

"Sec. 601. Purposes.
"Sec. 602. Definitions.

"Part II-Use of Cable Channels and Ownership Restrictions

"Sec. 611. Cable channels for public, educational, or governmental use.
"Sec. 612. Cable channels for commercial use.
"Sec. 613. Ownership restrictions.

"Part III--Franchising and Regulation

"Sec. 621. General franchise requirements.
"Sec. 622. Franchise fees.
"Sec. 623. Regulation of rates.
"Sec. 624. Regulation of services, facilities, and equipment.
"Sec. 625. Modification of franchise obligations.
"Sec. 626. Renewal.
"Sec. 627. Conditions of sale.

"Part IV--Miscellaneous Provisions

"Sec. 631. Protection of subscriber privacy.
"Sec. 632. Consumer protection.
"Sec. 633. Unauthorized reception of cable service.
"Sec. 634. Equal employment opportunity.
"Sec. 635. Judicial proceedings.
"Sec. 636. Coordination of Federal, State, and local authority.
"Sec. 637. Existing franchises.
"Sec. 638. Criminal and civil liability.
"Sec. 639. Obscene programming.".

Sec. 3. Jurisdiction.
Sec. 4. Pole attachments.
Sec. 5. Unauthorized reception of certain communications.

Sec. 6. Technical and conforming amendments.
Sec. 7. Support of activities of the United States Telecommunications Training Institute.
Sec. 8. Telecommunications Policy Study Commission.
Sec. 9. Effective date.

AMENDMENT OF COMMUNICATIONS ACT OF 1934

Sec. 2. The Communications Act of 1934 is amended by inserting after title V the following new title:

"TITLE VI--CABLE COMMUNICATIONS

"Part I--General Provisions

"PURPOSES

[47 USC 521.]
"Sec. 601. The purposes of this title are to--

"(1) establish a national policy concerning cable communications;

"(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

"(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

"(4) assure that cable communications provide and are encouraged to provide the

widest possible diversity of information sources and services to the public;

"(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

"(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

"DEFINITIONS

[47 USC 522.]

"Sec. 602. For purposes of this title--

"(1) the term 'affiliate, when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

"(2) the term 'basic cable service' means any service tier which includes the retransmission of local television broadcast signals;

"(3) the term 'cable channel' or 'channel' means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

"(4) the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

"(5) the term 'cable service' means--

"(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

"(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

"(6) the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

"(7) the term 'Federal agency' means any agency of the United States, including the Commission;

"(8) the term 'franchise' means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 626), issued by a franchising authority, whether such authorization is designated as a franchise,

whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

"(9) the term 'franchising authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise;

"(10) the term 'grade B contour' means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

"(11) the term 'other programming service' means information that a cable operator makes available to all subscribers generally;

"(12) the term 'person' means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

"(13) the term 'public, educational, or governmental access facilities' means--

"(A) channel capacity designated for public, educational, or governmental use; and

"(B) facilities and equipment for the use of such channel capacity;

"(14) the term 'service tier' means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

"(15) the term 'State' means any State, or political subdivision, or agency thereof; and

"(16) the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

"Part II--Use of Cable Channels and Cable Ownership Restrictions

"CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

[47 USC 531.]

"Sec. 611. (a) A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

"(b) A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 626, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

"(c) A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b).

"(d) In the case of any franchise under which channel capacity is designated under subsection (b), the franchising authority shall prescribe--

"(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

"(2) rules and procedures under which such permitted use shall cease.

"(e) Subject to section 624(d), a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

"(f) For purposes of this section, the term 'institutional network' means a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.

Part III—Franchising and Regulation

General Franchise Requirements

Sec. 621. (a)(1) A franchising authority may award, in accordance with the provisions of this title, one or more franchises within its jurisdiction.

* * * * *

(a)(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

* * * * *

Regulation of Rates

[47 USC 543.]

Sec. 623. (a) Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

(b)(1) Within 180 days after the date of the enactment of this title, the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition. Such regulations may apply to any franchise granted after the effective date of such regulations. Such regulations shall not apply to any rate while such rate is subject to the provisions of subsection (*c*).

(2) For purposes of rate regulation under this subsection, such regulations shall—

(A) define the circumstances in which a cable system is not subject to effective competition; and

(B) establish standards for such rate regulation.

(3) The Commission shall periodically review such regulations, taking into account developments in technology, and may amend such regulations, consistent with paragraphs (1) and (2), to the extent the Commission determines necessary.

(c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—

(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

(d) Any request for an increase in any rate regulated pursuant to subsection (b) or (c) for which final action is not taken within 180 days after receipt of such request by the franchising authority shall be deemed to be granted, unless the 180-day period is extended by mutual agreement of the cable operator and the franchising authority.

(e)(1) In addition to any other rate increase which is subject to the approval of a franchising authority, any rate subject to regulation pursuant to this section may be increased after the effective date of this title at the discretion of the cable operator by an amount not to exceed 5 percent per year if the franchise (as in effect on the effective date of this title) does not specify a fixed rate or rates for basic cable service for a specified period

or periods which would be exceeded if such increase took effect.

(2) Nothing in this section shall be construed to limit provisions of a franchise which permits a cable operator to increase any rate at the operator's discretion; however, the aggregate increases per year allowed under paragraph (1) shall be reduced by the amount of any increase taken such year under such franchise provisions.

(f) Nothing in this title shall be construed as prohibiting any Federal agency, State, or a franchising authority, from—

(1) prohibiting discrimination among customers of basic cable service, or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.

(g) Any State law in existence on the effective date of this title which provides for any limitation or preemption of regulation by any franchising authority (or the State or any political subdivision or agency thereof) of rates for cable service shall remain in effect during the 2-year period beginning on such effective date, to the extent such law provides for such limitation or preemption. As used in this section, the term 'State' has the meaning given it in section 3(v).

[47 USC 153. Report]

(h) Not later that 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace.

* * * * *

JURISDICTION

Sec. 3. (a)(1) Section 2(a) of the Communications Act of 1934 is amended by adding at the end thereof the following: "The provisions of this Act shall apply with respect to cable service to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI."

(2) Section 2(b) of such Act is amended by inserting after "section 301" the following: "and title VI".

(b) the provisions of this Act and amendments made by this Act, shall not be construed to affect any jurisdiction the Federal Communications Commission may have under the Communications Act of 1934 with respect to any communication by wire or radio (other than cable service, as defined in section 602(5) of such Act) which is provided through a cable system, or persons or facilities engaged in such communications.

* * * * *

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 87-671

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF CONNECTICUT, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

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February 22, 1988

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QUESTION PRESENTED

Was the Federal Communications Commission's determination that the availability of three over-the-air broadcast signals constitutes "effective competition" for purposes of Section 623 of the Cable Communications Policy Act of 1984 arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
ARGUMENT	8
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Air Transport Association of America v. CAB, 732 F.2d 219 (D.C. Cir. 1984) 16

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 16

National Ass'n of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985) 16

United States Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) 16

ADMINISTRATIVE DECISIONS AND REPORTS:

Amendment to the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 52 Fed. Reg. 37461 (Oct. 7, 1987) 8

Implementation of Cable Communications Policy Act of 1984, 52 Fed. Reg. 36801 (Oct. 1, 1987) 8

STATUTORY PROVISIONS:

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, *codified at* 47 U.S.C. § 521 *et seq.*

§ 602, 47 U.S.C. § 522 ..... 3, 11
§ 611, 47 U.S.C. § 531 3
§ 622, 47 U.S.C. § 542 3
§ 623, 47 U.S.C. § 543 ..... *passim*
§ 624, 47 U.S.C. § 544 3

Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*

Title II, 47 U.S.C. § 201 *et seq.* 13
§ 405, 47 U.S.C. § 405 16

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS: Page

H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 66 (1984) 6, 10, 12

130 Cong. Rec. H10436 (daily ed. Oct. 1, 1984) 2, 3

MISCELLANEOUS:

Broadcasting, Feb. 15, 1988, p. 18 9

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

The National Cable Television Association, Inc. ("NCTA") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed jointly by the State of Connecticut, the City of New York, the National League of Cities, and the American Civil Liberties Union ("Petitioners"). NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 80 percent of the nation's approxi-

mately 43 million cable subscribers.* NCTA was an intervenor in the proceedings below and is, therefore, a respondent in this proceeding.

STATEMENT OF THE CASE

This case involves the Federal Communications Commission's implementation of one provision of the Cable Communications Policy Act of 1984 (the "Act").[1] That law amended the Communications Act of 1934 to establish, for the first time, a comprehensive federal statutory framework for the regulation of cable television. Embodying a compromise between the cable television industry and state and local governments, the Act generally codified the authority of such governments to require cable operators to obtain franchises before providing service—authority that had been unclear and was increasingly being "challenged at the FCC and in the courts."[2] At the same time, the Act imposed limits on the requirements and conditions that may be imposed by franchising authorities, thereby eliminating many of the burdens and excesses of regulation that had hampered the efficient growth and development of cable in the increasingly competitive marketplace of video and entertainment services.

As Representative Wirth, the chairman of the House Telecommunications Subcommittee and the bill's principal sponsor in the House of Representatives, explained, "[t]he legislation protects local authority over cable television in several important respects."[3] For example, in

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* NCTA has no parent companies, subsidiaries or affiliates.

[1] Public Law 98-549, 98 Stat. 2779 (Oct. 30, 1984), *codified at*, 47 U.S.C. § 521 *et seq.*

[2] 130 Cong. Rec. H10436 (daily ed. Oct. 1, 1984) (remarks of Rep. Wirth).

[3] *Id.*

addition to requiring cable operators to obtain franchises, the Act permits cities to impose annual franchise fees of up to five percent of the cable operator's gross revenues;[4] to enforce franchise requirements for facilities and equipment and for "broad categories of video programming," though not for specific program services;[5] and to require cable operators to provide public, educational and governmental access channels and facilities.[6]

But the legislation also "contains several provisions to provide the industry with the certainty and stability it needs to make large financial investments to construct and operate cable systems."[7] In particular, Section 623 of the Act prohibits the regulation of rates for cable service except in certain, limited circumstances. Although it was understood that the Cable Act would generally deregulate rates after a two-year transition period,[8] Section 623 allows continued regulation of basic cable service "in circumstances in which a cable system is not subject to effective competition."[9] The Act di-

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[4] Act, § 622, 47 U.S.C. § 542.

[5] *Id.*, § 624, 47 U.S.C. § 544.

[6] *Id.*, § 611, 47 U.S.C. § 531.

[7] Remarks of Rep. Wirth, *supra*, 130 Cong. Rec. at 10436.

[8] Rep. Wirth, for example, stated that the Act "[d]eregulates the rates charged for basic cable service in 2 years, allowing the marketplace to dictate the price for cable programming and services . . . ." *Id.*

[9] "The term 'basic cable service' means any service tier which includes the retransmission of local television broadcast signals." Act, § 602(2), 47 U.S.C. § 522(2). Cable operators typically offer a wide range of programming services, such as distant broadcast signals and nonbroadcast satellite-delivered networks, in addition to the retransmission of local signals. Some of these services may be provided along with local broadcast signals as a separately priced package or "tier." Others may be offered together in a separately available tier that does not include local broadcast signals. Still others, such as premium movie channels, may be offered alone

rected the Federal Communications Commission, within 180 days of the law's enactment, to promulgate rules defining "effective competition" for this purpose and establishing standards for basic rate regulation in the absence of effective competition. It is the definition adopted by the Commission, which the court below affirmed, that is at issue in this case.

Completing its rulemaking proceeding within the time period mandated by Congress, the Commission concluded that "a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals." [10] In adopting this definition of "effective competition," the Commission rejected proposals of some commenting parties to require the availability of a larger (or smaller) number of broadcast signals. It also rejected proposals to require, in addition to broadcast signals, the availability of non-broadcast alternatives to cable, such as multichannel multipoint distribution systems and direct broadcast satellite-services,[11] that might provide an array of non-broadcast program services comparable to those that are often provided along with local and distant broadcast stations as part of the cable operator's basic service. And it rejected proposals of the Department of Justice and others that would, as described by Petitioners, "apply antitrust market analysis to the 'effective competition' issue." [12]

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on a per-channel basis. Under the Act, only the basic tier rate may ever be regulated, and it may only be regulated in the absence of "effective competition." Act, § 623(b), 47 U.S.C. § 543(b).

[10] *Report and Order*, ¶ 100 (Appendix to Petition for Writ of Certiorari at A17). (Hereinafter, the Appendix will be cited as "Pet. App. at ——.")

[11] *See* Comments of National League of Cities at 45 (Jan. 28, 1985).

[12] Petition for Writ of Certiorari ("Petition") at 18.

The Commission acknowledged these proposals but explained why, in its view, "the existence of three or more off-the-air broadcast signals in the cable market provides viewers with adequate programming choices and presents an effective constraint on the market power of a cable system in the provision of basic service." [13] With respect to the requisite number of broadcast signals, the only empirical evidence submitted by commenting parties—an economic analysis of cable rates in unregulated markets submitted by NCTA—indicated that, while the availability of the first, second and third broadcast signal in a community each has an incremental competitive effect on the price of basic cable service, additional signals have no further effect on basic rates.[14] A three-signal threshold was also indicated by a study, conducted by the Commission's staff, of Arbitron viewership data in markets with two, three, four and five available broadcast signals. That study showed that viewership of basic cable programming other than locally available broadcast stations was sufficiently high to indicate possible market power in markets with fewer than three available broadcast signals, but not in markets with three or more signals.[15] Absent any empirical evidence indicating that broadcast signals beyond the third would have any significant effect on basic cable rates, the Commission determined that its definition of effective competition should require no more than three such signals.

With respect to its decision to define effective competition solely in terms of availability of local broadcast signals and not to require the availability of nonbroadcast alternatives to cable, the Commission acknowledged "that

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[13] *Report and Order*, ¶ 100 (Pet. App. at A46).

[14] *See*, Comments of the National Cable Television Association and Community Antenna Television Association, Appendix A (Jan. 28, 1985).

[15] *Report and Order*, ¶ 99 (Pet. App. at A46-47).

many cable systems provide a number of services in addition to the retransmission of off-the-air signals" [16] as part of their basic service. But "[f]or these additional basic services to be a source of market power, it must first be shown that a significant demand exists for these services and that such demand is relatively inelastic." [17] The Commission found no evidence in the record of any such significant or inelastic demand for access channels or satellite program services provided as part of basic cable service; indeed, it found evidence to the contrary.[18] For this reason, the Commission rejected the notion "that a cable system gains significant market advantage by the provision of this additional programming in those markets where there are sufficient (*i.e.*, three or more) off-the-air broadcast signals." [19]

Finally, in opting for a standard based on available broadcast signals rather than the multi-pronged antitrust market analysis urged by the Department of Justice, the Commission did not dispute the utility and validity of antitrust-style analysis in accurately assessing market power on a case-by-case basis. But, as the Commission noted in its Notice of Proposed Rulemaking, Congress specifically intended that the Commission define effective competition in terms of "readily applicable criteria" and that "[r]egulations should specify objective criteria to avoid the need for an independent examination of the status of competition on a community-by-community basis." [20] The Commission concluded that its

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[16] *Report and Order*, ¶ 100 (Pet. App. at A46).

[17] *Id.*, n.68.

[18] *Id.*

[19] *Id.*, ¶ 100 (Pet. App. at A47).

[20] Notice of Proposed Rulemaking, 49 Fed. Reg. 48765, 48770 (Dec. 14, 1984), *quoting* Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 66 (1984) ("House Report").

standard based on availability of broadcast signals provided "a reasonable benchmark for determining effective competition with basic cable services" and best met "the congressional intent of an administratively manageable standard for the Commission, franchising authorities and cable operators." [21]

None of the Petitioners sought reconsideration by the Commission of its "effective competition" standard. Instead, they went directly to the court of appeals, where they "launch[ed] a broad assault on virtually every argument cited by the FCC in support of its rules, and every component of the rules themselves." [22] The court determined, however, that the Commission had acted reasonably both in defining "effective competition" solely in terms of the availability of a certain number of broadcast signals and in selecting three as the appropriate number. The court found that the Commission had "considered the alternatives suggested by the commenters and offered cogent reasons for adopting a three-signal availability standard." [23]

The court of appeals also found, however, that, while defining effective competition to exist where three broadcast stations are available was wholly reasonable, the Commission had acted arbitrarily in determining when a broadcast station should be deemed "available." Under the Commission's rules, a station would be considered available if it placed a signal of Grade B strength over "any portion" of the cable community. The court held that if a signal was to be deemed available as an effective competitor to cable service, "it was incumbent upon the FCC to craft the standard more carefully, to ensure

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[21] *Report and Order*, ¶ 98 (Pet. App. at A45).

[22] *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1563 (D.C. Cir. 1987) (Pet. App. at A141).

[23] *Id.* at 1564 (Pet. App. at A144).

that a signal is at least theoretically available over the entire cable community or at least some significant portion of the cable community." [24] The court also rejected two minor aspects of the standards adopted by the Commission governing rate regulation in those communities where, because fewer than three broadcast stations are available, rate regulation remains permissible.[25] But apart from these exceptions, the court held "that the FCC's rate regulation rules are affirmed in all respects." [26]

ARGUMENT

This case raises no unusual, unresolved or extraordinary issues that warrant review by this Court. In determining that the Commission acted reasonably in implementing its statutory mandate, the court below applied well-established principles of administrative law and statutory construction. Although Petitioners seek to portray the Commission's decision as arbitrary and inconsistent with the Act and the court's decision as erroneous, their real complaint is that they would like more regulatory authority over rates than the Act gave them. To the extent that there has been a "nationwide impact" on the "traditional cable rate regulation powers" of state and local governments, as alleged by Petitioners,[27] such impact is directly attributable to the Act—which was specifically intended to prohibit rate regulation except in

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[24] *Id.* at 1572 (Pet. App. at A160-61). The Commission is currently conducting a rulemaking proceeding to amend its definition of signal availability. *See Implementation of Cable Communications Policy Act of 1984*, 52 Fed. Reg. 36801 (Oct. 1, 1987).

[25] 823 F.2d at 1565-71 (Pet. App. at A145-158). The Commission has already amended its standards in accordance with the court's decision. *See Amendment to the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 52 Fed. Reg. 37461 (Oct. 7, 1987).

[26] 823 F.2d at 1564 (Pet. App. at A143).

[27] Petition at 15.

limited circumstances—and not to any novel or arbitrary substantive or procedural approaches taken by the Commission or by the court below.

As evidence of the impact of rate deregulation or of changed conditions in the video marketplace becomes available, the Commission is required by the Act to "periodically review" [28] its rules and, in any event, must prepare a report for Congress on rate deregulation and "the effect of competition in the marketplace" before October 30, 1990.[29] Moreover, Congress is closely monitoring the effects of its deregulatory mandate.[30] If implementation of the Act leads to results that Congress either did not intend or does not desire, it can and will make its views known to the Commission and amend the Act. But Petitioners present no basis whatever for concluding that, in light of the statute, the legislative history and the rulemaking record, the Commission's rules are in any respect arbitrary, capricious or otherwise not in accordance with law.

I

Petitioners contend that the court of appeals ignored and therefore "sanction[ed] a significant departure from" [31] this Court's edict that, in construing statutes, courts and agencies "must give effect to the unambiguously expressed intent of Congress." [32] The court of appeals was, however, well aware of that principle and, in fact, relied specifically upon it in invalidating one of the Commission's standards governing rate regulation in the

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[28] Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

[29] *Id.*, § 623(h), 47 U.S.C. § 543(h).

[30] The House Telecommunications Subcommittee intends to hold oversight hearings on the implementation of the Act in March 1988. *See Broadcasting*, Feb. 15, 1988, p. 18.

[31] Petition at 15.

[32] *Id.* at 16, *quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

absence of effective competition.[33] But it upheld the Commission's approach to defining effective competition because, contrary to Petitioners' faulty reading of the Act, that approach was in no way inconsistent with the explicit legislative intent.

Petitioners complain, first, that while the Act directs the Commission to "define the circumstances in which a cable system is not subject to effective competition," the Commission erroneously interpreted its task as defining the circumstances in which a cable system's *basic service* is not subject to effective competition. The Commission's approach was, in fact, not only reasonable on its face but wholly consistent with the "expressed intent of Congress."

Thus, Congress specifically intended "that this rulemaking focus solely on whether there is effective competition *sufficient to warrant the regulation of rates for basic cable service.*" [34] This follows from the fact that the only rates that can be regulated under the Act, even in the absence of effective competition, are rates for basic service. In its comments in the rulemaking proceeding, the Department of Justice explained why it would, therefore, be irrational to define effective competition, for purposes of the Act's rate regulation provisions, in terms of anything other than basic service:

> It would make little sense . . . to regulate the price of basic cable service if all of a cable system's market power was derived from and could be exercised in the provision of services that are expressly excluded from rate regulation under the Act.[35]

Second, Petitioners contend that, even if it was correct to focus on effective competition for basic cable service,

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[33] *See* 823 F.2d at 1565-70.

[34] House Report, *supra*, at 66 (emphasis added).

[35] Comments of the United States Department of Justice at 24 (Jan. 28, 1985).

the Commission erroneously viewed basic cable service as only that portion of the basic tier that includes local broadcast signals and "excluded all non-broadcast programming (except access channels)" [36] that might also be provided on the same tier. In so doing, the Commission, according to Petitioners, ignored the unambiguous statutory definition of "basic cable service," which encompasses the entire "tier which includes . . . local television broadcast signals." [37]

The Commission, however, did no such thing. Having observed, in its Notice of Proposed Rulemaking, that "[i]n essence, basic cable service is the provision of locally viewed broadcast signals" [38]—because, "as a matter of definition," [39] basic service always includes local broadcast signals but may or may not include various nonbroadcast services—the Commission nevertheless selected a standard that was intended to reflect the number of available local broadcast signals necessary to provide effective competition to the entire basic service package. Thus, the Commission recognized that "many cable systems provide a number of services in addition to the retransmission of off-the-air signals" [40] on their basic service tiers. But it specifically concluded that cable systems would not gain "significant market advantage by the provision of this additional programming in those markets where there are sufficient (*i.e.*, three or more) off-the-air broadcast signals." [41]

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[36] Petition at 16.

[37] Act, § 602, 47 U.S.C. § 522.

[38] *Notice of Proposed Rulemaking, supra,* 49 Fed. Reg. at 48770.

[39] *Id.*

[40] *Report and Order,* ¶ 100 (Pet. App. at A46).

[41] *Id.* (Pet. App. at A47). By implication, the Commission determined that cable systems might be able to exercise market power from the provision of services other than local broadcast signals in markets with fewer than three such signals. If, as Petitioners

Finally, Petitioners contend that Congress unambiguously directed the Commission not to define effective competition solely in terms of a specific number of broadcast signals. But, as the court of appeals recognized, that is not what the Act or the legislative history actually says. Petitioners point to no provision of the Act imposing such a directive, and their attempt to read such a requirement into the legislative history was correctly rejected by the court of appeals. The legislative history suggests, first, that the Commission, in fashioning a standard, "should consider the number and nature of [cable] services provided, compared with the nature and number of services available from alternative sources and, if so, at what price," and, second, that it "may find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market . . . ."[42] Thus, as the court of appeals concluded, "[t]he FCC's mandate was to 'consider' various alternatives, including, it seems, one in which effective competition would be measured solely in terms of the availability of broadcast signals."[43]

If the Commission had determined that broadcast signals alone were not sufficient to constrain market power in the provision of basic cable service but nevertheless selected a standard based solely on the availability of broadcast signals, Petitioners' challenge might have been persuasive. But having considered the alternatives and determined that three broadcast signals were gen-

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suggest, the Commission was only concerned with whether there was effective competition for the local broadcast component of basic service, it would necessarily have concluded that there was *always* effective competition. Even where there are only one or two available local broadcast stations, the availability of those signals to viewers over-the-air free of charge obviously constitutes effective competition to the provision of those same signals by a cable system.

[42] House Report, *supra*, at 66.

[43] 823 F.2d at 1564 (Pet. App. at A144).

erally sufficient to provide effective competition to basic cable service, the Commission was not constrained (and it would have been irrational) to require in its standard the additional availability of other nonbroadcast programming sources.[44]

II

Petitioners contend that, in failing to adopt a definition of effective competition that embodies "antitrust market analysis," the Commission violated "the accepted and usual doctrine that requires agencies to consider all relevant factors and explain departures from longstanding policies."[45] They confuse the Commission's refusal to adopt the antitrust approach urged by the Department of Justice with a failure to consider it. Moreover, the fact that the Commission uses marke analysis in regulating telephone common carrier services and facilities pursuant to Title II of the Communications Act of 1934, 47 U.S.C. Sec. 201 *et seq.* does not make its rejection of such an approach in implementing a wholly different statutory task a "departure from longstanding policies."

In its *Report and Order*, the Commission specifically acknowledged that the Department of Justice had pro-

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[44] Petitioners also argue that, because Congress ultimately rejected a provision in the version of the cable bill initially passed by the Senate, which deregulated rates whenever there were four available broadcast signals, and instead gave the Commission the responsibility of determining what constituted effective competition, Congress clearly did not intend that the Commission ultimately adopt a standard based solely on broadcast signals. *See* Petition at 17-18. This is a wholly unpersuasive argument. In rejecting the Senate-passed provision, Congress cannot even be viewed as having precluded the ultimate adoption by the Commission of a similar four-signal standard. What Congress decided was not that effective competition could not be defined solely in terms of broadcast signals but that it should be defined by the Commission on the basis of a rulemaking record rather than by legislative fiat.

[45] Petition at 18.

posed that effective competition be defined to require "a minimum of five broadcast signals" [46] and that "other criteria be considered in addition to the signal complement." [47] And the Commission also explained why it adopted a different approach.[48] The Commission sought a standard that would, as Congress desired, be "readily applicable" and "avoid the need for an independent examination of the status of competition on a community-by-community basis." [49] As the National Telecommunications and Information Administration (NTIA) had pointed out to the Commission, the multifaceted, antitrust-type approach proposed by the Justice Department "would create an administrative nightmare, something which Congress specifically sought to avoid." [50]

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[46] *Report and Order*, ¶ 95 (Pet. App. at A42).

[47] *Id.*, n.59.

[48] The reason why the Commission "went so far as to dismiss, as based upon 'supposition and intuition,'" the Justice Department's five-signal proposal, Petition at 18, is that the Department had itself stated that "it appears *intuitively* that five broadcast stations are necessary," but that "the precise number of stations could be determined with more accuracy if reliable empirical evidence were available—and could be more or less than we suggest." Department of Justice Comments at 37 (emphasis added). Studies by NCTA and the Commission's staff supplied empirical evidence that showed that a three-signal standard was more appropriate.

[49] House Report, *supra*, at 66.

[50] Reply Comments of NTIA 5 (Feb. 11, 1985). What the Justice Department specifically proposed was that effective competition be presumed to exist if any two of the following criteria were satisfied: First, "at least five unduplicated broadcast stations, including affiliates of the three networks, can be received adequately by consumers in the cable system's franchise area." Second, "the total number of channels on the basic tier, excluding local access, teletext and similar channels, is less than three times the number of broadcast stations that can be received adequately in the cable system's franchise area . . . . For the purpose of applying this criteria, the number of channels on the basic tier should be reduced by the number of substitute channels actually provided in the market by al-

Ultimately, the Commission concluded that three broadcast signals would generally be sufficient to constrain basic cable rates. And, in rejecting alternative standards that might require consideration of additional marketplace factors, the Commission explained that the three-signal standard "meets the congressional intent of an administratively manageable standard for the Commission, franchising authorities and cable operators." [51]

III

Finally, Petitioners complain that the Commission should not have been permitted by the court of appeals to have relied upon a study conducted by its staff in the course of the rulemaking proceeding because the study was "virtually unavailable for public comment" [52] until the Commission issued its *Report and Order*. In fact, the Commission dealt with its internal study in a manner wholly consistent with sound administrative procedure and precedent.

There is no legal doctrine that prevents an agency from using its own resources to supplement or confirm the evidence in a rulemaking record by conducting a study in the course of the proceeding. If, in such circumstances, "[t]he staff studies were placed in the pub-

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ternative delivery systems at a price comparable to that charged for basic service." Third, "[n]o more than 20 percent of the cable system's subscribers subscribe only to the basic tier as of the date of the Act." Department of Justice Comments, *supra*, at 36-41.

Senator Goldwater, the Cable Act's principal sponsor in the Senate, specifically urged the Commission to reject this "convoluted" standard because it was a "complicated and theoretical antitrust approach to what Congress intended to be simple and practical rulemaking." Letter of Sen. Goldwater to Chairman Mark S. Fowler (Mar. 26, 1985).

[51] *Report and Order*, ¶ 98 (Pet. App. at A45).

[52] Petition at 20.

lic docket at the close of the rulemaking," [53] and, by petitioning for reconsideration, interested parties eventually had ample opportunity to address the staff study," [54] the courts have held that there is no procedural deficiency.[55] Indeed, this Court has held that, even where a study was not disclosed until after reconsideration was denied, this "procedural lapse" was not a "sufficient ground for reopening the proceedings before the Commission." [56]

In the present case, the Commission could not control its timetable. It could not wait to issue a Notice of Proposed Rulemaking until it had conducted its own internal studies and analyses, and it could not postpone issuing a rule until all parties had an opportunity to comment on those studies and analyses. The Act required that the Commission promulgate rules and make them effective within 180 days. In these circumstances, the Commission was required, at most, only to disclose its reliance on these studies in its final decision and to place the studies in the public record at the close of the rulemaking proceeding—which is precisely what the Commission did.[57] Petitioners had ample opportunity to challenge the

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[53] *Air Transport Ass'n of America v. CAB*, 732 F.2d 219, 224 (D.C. Cir. 1984).

[54] *National Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985).

[55] *See also United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519, 535 (D.C. Cir. 1978).

[56] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 591 n.22 (1981).

[57] The internal staff study was placed in the record on May 1, 1985—one day before the Commission's *Report and Order* appeared in the Federal Register. *See* Memorandum of Bruce Franca, Policy Analysis Branch, to Joyce Butler, Dockets Branch (May 1, 1985). Interested parties have 30 days after a Commission decision appears in the Federal Register in which to seek reconsideration. *See* 47 U.S.C. § 405.

validity and relevance of the staff study—and of the NCTA study—in petitions for reconsideration, but they simply chose not to do so.

CONCLUSION

For the foregoing reasons, the Petition presents no issues that warrant review by this Court and should be denied.

Respectfully submitted,

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No. 87-671

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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15 P

QUESTION PRESENTED

Congress provided in 1984 that local authorities may "regulate rates for the provision of basic cable [television] service [only] in circumstances in which a cable system is not subject to effective competition" and directed the Federal Communications Commission to "define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. (Supp. III) 543(b)(1) and (2)(A). The question presented is whether the Commission permissibly concluded that "effective competition" exists when three broadcast television signals can be received "off the air" in a community.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

City of New York v. *FCC*, cert. granted, No. 87-339 (Nov. 30, 1987) 11

Clarksburg Publishing Co. v. *FCC*, 225 F.2d 511 (D.C. Cir. 1955) 5

Statutes and regulation:

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. (Supp. III) 521 *et seq.* 2

§ 623, 47 U.S.C. (Supp. III) 543 2

§ 623(a), 47 U.S.C. (Supp. III) 543(a) 2

§ 623(b)(1), 47 U.S.C. (Supp. III) 543(b)(1) 2

§ 623(b)(2)(A), 47 U.S.C. (Supp. III) 543(b)(2)(A) .. 2, 7

§ 623(b)(3), 47 U.S.C. (Supp. III) 543(b)(3) 3, 7

§ 623(h), 47 U.S.C. (Supp. III) 543(h) 3, 7

47 C.F.R. 76.5(k) 5

Miscellaneous:

H.R. Rep. 98-934, 98th Cong., 2d Sess. (1984) 8

Kwoka, *The Effect of Market Share Distribution on Industry Performance*, 61 Rev. Econ. & Statistics 101 (1979) 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A115-A185) is reported at 823 F.2d 1554. The orders of the Federal Communications Commission (Pet. App. A1-A95, A96-A114) are reported at 50 Fed. Reg. 18637 and 51 Fed. Reg. 21770.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1987. The petition for a writ of certiorari was filed on October 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Most cable television operators provide "basic" and "premium" services. Basic service, which all subscribers receive, usually includes retransmission of local broadcast

signals and satellite programming such as the Cable News Network. Premium service, for which subscribers pay additional fees if they desire it, typically includes channels such as Home Box Office. See Pet. App. A131 n.3. Prior to 1984, the Federal Communications Commission had concluded that local authorities could regulate the rates charged for basic cable service, but could not regulate the rates charged for premium services. *Id.* at A131.

In 1984, Congress enacted the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. (Supp. III) 521 *et seq.* Section 623(a) of the Act provides that local authorities "may * * * regulate the rates for the provision of cable service * * * only to the extent provided under this section." 47 U.S.C. (Supp. III) 543(a). Section 623 does not authorize the regulation of rates for premium service; Congress's decision not to permit regulation of premium service rates "appears to have been made based, at least in part, on a belief that alternative video delivery systems [such as video cassette recorders and direct satellite reception] provided sufficient existing or potential competition to nonbasic services that rate controls would be counterproductive." Pet. App. A44-A45. Section 623(b)(1) provides that local authorities may "regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." 47 U.S.C. (Supp. III) 543(b)(1). Thus, under the Act only basic service is subject to rate regulation, and it is subject to such regulation only in the absence of "effective competition."

Congress directed the Commission to promulgate regulations that "define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. (Supp. III) 543(b)(2)(A). It provided that the Commission was to adopt such regulations within 180 days (47 U.S.C. (Supp. III) 543(b)(1)) and further provided that "[t]he

Commission shall periodically review such regulations" and amend them "to the extent the Commission determines necessary" (47 U.S.C. (Supp. III) 543(b)(3)). In addition, Congress directed the Commission to submit "a report regarding rate regulation of cable services" by 1990. 47 U.S.C. (Supp. III) 543(h).

2. The Commission promptly instituted the rulemaking proceeding that is the subject of petitioners' complaints. After receiving comments from more than 140 parties (Pet. App. A134), the Commission concluded that "a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals" (*id.* at A47 (footnote omitted)).

Before reaching that conclusion, the Commission first considered whether it should adopt standards for determining when an entire "cable system" (including both basic and premium service) is subject to effective competition or whether it should limit its inquiry to establishing standards for determining whether basic cable service is subject to effective competition. The Commission concluded that since "rate regulation authority is limited to regulation of basic cable service," it should limit its analysis to the "question of effective competition to basic cable service." Pet. App. A43. The Commission disagreed with the concern of some commenters that "cable systems may have market power in the provision of nonbasic service and that this power could be extended to their provision of basic service," concluding that its review of the antitrust literature convinced it that there is no merit to such a "tying arrangement" argument. *Id.* at A44 n.63.

The Commission further determined that "a standard for defining effective competition based on the availability of off-the-air broadcast signals in the cable system's community is appropriate." Pet. App. A43. It thus concluded

that the question whether effective competition exists should be answered by determining the number of television stations that can be received in a community without the use of cable and rejected suggestions that it should consider other factors, such as the "penetration rate" of cable service. Noting that a number of commenters had proposed that a cable operator should be subject to rate regulation if 70% of households in the community have subscribed, on the theory that such a high penetration rate shows a lack of effective competition (*id.* at A49), the Commission stated that "a penetration criterion would penalize cable operators who have attained substantial subscriber penetration by providing low-priced popular cable offerings and services" (*id.* at A51).

The Commission next concluded that "three broadcast signals are the minimum number of signals needed" to ensure that there is effective competition to basic cable service. Pet. App. A45. The Commission determined that the presence of three broadcast stations would be "sufficient to allow viewers adequate and significant programming choices" and to ensure that basic cable service "does not become a source of market power for the cable operator." *Ibid.* In rejecting the suggestion that the existence of two broadcast stations would be sufficient, the Commission noted that its review of viewing data showed that "in two signal markets the viewership share of [cable] programming could be as large or larger than the off-air viewership of the typical local station in such a market" (*ibid.*)—thus indicating a potential for market power in such communities. The Commission also rejected suggestions that more than three broadcast signals should be required. It noted that "[i]n three signal markets, the cable viewership of such basic programming was in general less than the off-air viewership of a single local signal" and less than one-third of the market, and concluded that a "viewership

share of 33% or less is a reasonable indication of lack of market power" (*id.* at A45-A46 & n.65).

Finally, the Commission considered when a broadcast television signal would be presumed to be available off the air for purposes of its three-signal "effective competition" standard. It concluded that a signal would be deemed available when it placed a predicted "Grade B contour"—a measurement of the approximate extent of coverage of a television signal indicating that 50% of the locations at the edge of the contour can expect to receive a good quality picture 90% of the time (*Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 515-516 n.12 (D.C. Cir. 1955); see Pet. App. A135 n.8)—over any portion of the cable community or was "significantly viewed" (see 47 C.F.R. 76.5(k); Pet. App. A136 n.9) in the cable community. Pet. App. A50. The Commission noted that, under that standard, some cable systems will be determined to face effective competition "when in fact reception of three or more signals may not always be possible in the franchise area," but concluded that "administrative convenience" warranted the use of the signal availability standard it selected. *Id.* at A49-A50.

3. The court of appeals upheld the Commission's three-signal rule but invalidated its signal availability standard. Pet. App. A115-A185. The court noted that Congress has granted the Commission broad discretion in defining effective competition and had offered "no guidance on what factors the Commission should consider, or what weight it should assign to those factors." *Id.* at A143. With respect to its decision to define effective competition as the presence of three broadcast signals, the court concluded that "the Commission carefully considered proposed alternatives, explained the reasons underlying its decision, and reached a rational conclusion." *Ibid.* Therefore, "applying familiar principles

of judicial review" (*id.* at A142 (footnote omitted)), the court held "that the FCC's rate regulation rules are affirmed in all respects except to the extent specifically delineated" (*id.* at A143).

The court concluded that the Commission's determination of when a broadcast signal would be deemed available was faulty because of the "enormous margin of error created by its decision to 'count' *every* signal that covers '*any* portion of the cable community.' " *Id.* at A161 (citation omitted; emphasis in original). The court could not determine "why the 'any portion' standard was selected over a more refined geographical qualification, such as 'a significant portion of the cable community,' " or " 'over 75 percent of the cable community.' " *Id.* at A162 (citation omitted). On remand, the Commission has proposed to require that each of the three signals available in a community place a Grade B contour over at least 75% of the cable community. 2 F.C.C. Rec. 5888 (Sept. 28, 1987).

ARGUMENT

The court of appeals correctly concluded that the Commission did not err in promulgating its three-signal rule for determining when effective competition exists, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, two other factors make review inappropriate here. First, most of the petitioners are participating in the remand proceeding concerning the standards to be applied in determining whether a signal is available in a community and the outcome of that proceeding could affect the practical importance of the question presented. Therefore, review is unwarranted at this time, especially since petitioners will be free to raise the issues presented in this petition, together with any claims arising out of the remand proceeding, after the

completion of that proceeding. Second, pursuant to Congress's directive, the Commission is monitoring the effect of its three-signal rule particularly closely so that amendments can be made, if needed, and in order to report to Congress by 1990 on the effects of rate regulation of cable services. In these circumstances, review by this Court at this time is unwarranted.

1. Petitioners primarily argue (Pet. 15-18) that, in determining that "effective competition" exists when three broadcast television signals are available in a community, the Commission departed from the unambiguously expressed intent of Congress. There is no merit to that argument.

As an initial matter, as the court of appeals concluded (Pet. App. A143), rather than defining "effective competition" itself, Congress granted the Commission "broad discretion" to define it and provided "no guidance on what factors the Commission should consider, or what weight it should assign to those factors." Section 623(b)(2)(A) simply directs the Commission to "define the circumstances in which a cable system is not subject to effective competition" (47 U.S.C. (Supp. III) 543(b)(2)(A)), to "periodically review such regulations" and amend them "to the extent the Commission determines necessary" (47 U.S.C. (Supp. III) 543(b)(3)), and to "submit to the Congress a report regarding rate regulation of cable services" by 1990 (47 U.S.C. (Supp. III) 543(h)). Thus, the only intent that is unambiguously expressed in the statutory language is Congress's intent that the Commission should have considerable discretion in determining when effective competition exists. The legislative history confirms that conclusion. The House Report—which was "specifically adopted by both the House and the Senate as their explanations of the Act" (Pet. App. A153 n.33)—states that "[t]he Committee wishes to stress that it intends to give

the Commission flexibility in promulgating these regulations." H.R. Rep. 98-934, 98th Cong., 2d Sess. 66 (1984).

In these circumstances, there is no basis for petitioners' argument (Pet. 16) that the Commission departed from Congress's clear instruction that it define effective competition with respect to a "cable system" rather than "basic cable service." Congress gave no such instruction. Hence, as the Commission concluded (Pet. App. A43-A45), it plainly had discretion not to consider the effect of premium service when Congress has barred rate regulation of such service.

Nor does petitioners' citation of the House Report (Pet. 17) support its conclusion that Congress directed the Commission to promulgate an effective competition rule based on factors in addition to the number of broadcast television signals available over the air in a community, such as the penetration rate. The House Report stated that the Commission "may find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market, such as the penetration rate." H.R. Rep. 98-934, *supra,* at 66. Accordingly, it was plainly within the scope of the discretion granted to the Commission to use factors such as the penetration rate or not to do so.

Finally, with respect to the merits of the three-signal rule, petitioners contend (Pet. 17) that the fact that Congress did not enact the Senate bill providing that effective competition exists when four broadcast television signals can be received over the air in a community shows that it did not intend the Commission to adopt its three-signal rule. That is a non sequitur. Congress decided that, rather than initially attempting to define effective competition itself, it would direct the Commission to do so (and to report to Congress on the subject by 1990). The fact that, after studying the issue, the Commission has decided, at

least initially, on a standard that is similar to what the Senate proposed is not evidence that it has erred.[1]

2. Petitioners' procedural arguments (Pet. 18-20) are also without merit and, in any event, involve nothing more than the application of settled legal principles to the facts of this case and accordingly do not warrant this Court's attention. First, petitioners contend (*id.* at 18-19) that the Commission did not set forth a principled antitrust market analysis in promulgating its effective competition standard and should have explained why it did not do so. That appears to be little more than another way of saying that petitioners do not agree with the Commission's conclusions. In any event, the Commission did fully consider the likely effects on competition of its three-signal rule (see

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[1] Petitioners note (see Pet. 10) that the Commission's three-signal rule differs from that proposed by the Antitrust Division of the Department of Justice. The Antitrust Division did not disagree with the Commission's conclusions that "effective competition" should be defined with respect to basic cable service rather than basic and premium service and that a penetration rate of 70% or more did not necessarily show that there was no effective competition in a community. However, the Division proposed a definition providing that effective competition exists when two of the following conditions are met: (1) five unduplicated broadcast signals, including all three major networks, are available in the community; (2) the total number of channels provided as part of basic service (excluding certain channels that have limited viewership) is less than three times the number of signals available over the air; and (3) no more than 20% of the cable system's subscribers subscribed to basic service only (*i.e.*, did not receive any premium service) on the date the Act was enacted. C.A. App. 156-161. The fact that the Commission did not incorporate requirements like those suggested by the Division in its effective competition rule (at least, not yet) does not show that it abused its broad discretion under the Act. And, of course, Congress remains free to consider whether it wishes to prescribe other standards by statute.

Pet. App. A42-A47). Petitioners may also be suggesting that the Commission should have bolstered its conclusions with quantitative analysis. However, as the court of appeals concluded (*id.* at A144 (footnote omitted)), the Commission conceded "[w]ith admirable candor * * * that its decision to define 'effective competition' in terms of the availability of three broadcast signals was not an exercise in 'scientific precision.' Rather, the Commission made a predictive judgment based on the evidence it had accumulated in the relatively short time frame within which Congress directed the agency to complete its rulemaking." And, while the Commission's rule cannot be shown by statistical analysis of evidence in the record necessarily to be the best possible rule, petitioners have presented no empirical data proving that a different rule better determines when effective competition exists.

Finally, petitioners err in contending (Pet. 20) that the Commission erroneously relied upon three studies—the "NCTA/CATA study," a study by Commission staff, and the "Kwoka study"—without addressing significant criticisms of the methodology employed in those studies. The Commission did not rely on the NCTA/CATA study, but merely noted (Pet. App. A43) that it had been cited by many commenters as providing support for a standard based on fewer than two signals, a standard the Commission rejected. Similarly, the Kwoka study (Kwoka, *The Effect of Market Share Distribution on Industry Performance*, 61 Rev. Econ. & Statistics 101 (1979)) supported a two-signal rule; while the Commission noted that it provided "[f]urther support" for its conclusion that a three-signal rule would not result in monopolistic practices by cable operators (Pet. App. A46), the Commission plainly did not base its decision on that study. Rather, as the court of appeals noted (*id.* at A144), the Commission's decision

was a predictive judgment based on conflicting information that it had accumulated in order to promulgate a rule in the time allotted by Congress. The Commission's internal study was similarly cited as "further evidence" supporting the Commission's decision (*id.* at A45) rather than as primary evidence. And, contrary to petitioners' complaint that it was "virtually unavailable" (Pet. 11, 20), the bulk of the study was provided to petitioners and placed in the public rule-making record within two weeks of the Commission's decision (see C.A. App. 541-553). In any event, the question whether in this basically interim proceeding—whose conclusions are subject to further consideration by the Commission and by Congress itself, in light of experience—the Commission impermissibly relied on the three studies petitioners cite plainly does not warrant this Court's attention.[2]

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[2] While *City of New York* v. *FCC*, cert. granted, No. 87-339 (Nov. 30, 1987), also involves interpretation of the Cable Communications Policy Act of 1984, the question presented there is whether the Commission permissibly preempted the states from adopting regulations governing the technical quality of cable broadcasts that exceed federal guidelines. No question concerning "effective competition" is presented and the case involves a proceeding before the Commission entirely separate from the proceeding resulting in the Commission's three-signal rule. Accordingly, there is no reason to hold this case for *City of New York*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT, CITY OF NEW YORK, NATIONAL LEAGUE OF CITIES, and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

BRIEF FOR PETITIONERS IN REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

BRIEF FOR PETITIONERS IN REPLY 1

CONCLUSION 5

TABLE OF AUTHORITIES

Court Cases: **Page(s)**

Centel Cable Television Co. of Fla. v. Admiral's Cove Associates, Ltd., 835 F.2d 1359 (11th Cir. 1988) 2

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 2, 3

City of New York v. FCC, cert. granted, No. 87-339 (Nov. 30, 1987) 2

Statutes:

Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (Supp. 1987) 2

Section 601(2), 47 U.S.C. § 521(2) 2

Section 602(2), 47 U.S.C. § 522(2) 2

Section 623 (b)(2)(A), 47 U.S.C. § 543 (b)(2)(A) 3

Administrative Regulations and Materials:

Implementation of Cable Communications Policy Act of 1984, 52 Fed. Reg. 36801 (Oct. 1, 1987) 3

Legislative Materials:

130 Cong. Rec. H 10,442 (daily ed. Oct. 1, 1984) 2

Miscellaneous:

Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on Coaxial Wires*, 19 Ga. L. Rev. 543 (1985) 2

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Respondents.

BRIEF FOR PETITIONERS IN REPLY

Petitioners respectfully reply to the brief in opposition of the Federal Respondents, Federal Communications Commission ("FCC") and the United States of America, and the brief in opposition of the National Cable Television Association, Inc. ("NCTA").

The Federal Respondents suggest that the FCC was given virtually unlimited discretion to fashion its "effective competition" rules. (Br. for Fed. Resp. at 7–8). That grant of discretion did not, however, allow the FCC to ignore the

"unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Yet that is precisely what the FCC did by misstating the statutory purposes of the Cable Communications Policy Act of 1984 ("Cable Act"), disregarding statutory definitions of critical terms, and ignoring precise statutory language in fashioning its rules.[1]

Respondents essentially argue that the Cable Act was a deregulatory manifesto which allowed the FCC to deregulate basic cable service rates in nearly every cabled community in the United States. (See, *e.g.*, NCTA Br. at 8). They, however, overlook the fact that the Cable Act "is essentially a compromise," *Central Cable Television Co. of Fla. v. Admiral's Cove Associates, Ltd.*, 835 F.2d 1359, 1361 (11th Cir. 1988), citing 130 Cong. Rec. H 10, 442 (daily ed. Oct. 1, 1984) (statement of Rep. Dingell) and Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on Coaxial Wires*, 19 Ga. L. Rev. 543, 545-46 (1985). Thus, Congress sought to "establish franchise procedures and standards which [not only] encourage the growth and development of cable systems [but also] *assure that cable systems are responsive to the needs and interests of the local community.*" 47 U.S.C. § 521(2) (emphasis added). It is noteworthy that the FCC deliberately misstated the Cable Act's statutory purposes by omitting the underscored language from consideration when it promulgated the "effective competition" rules. (App. A56).

The Federal Respondents never explain why the FCC, in purporting to define "effective competition" for "basic cable service," could ignore the statutory definition of the latter term. 47 U.S.C. § 522(2). (See Pet. at 9-10). Indeed, they somehow

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[1] Contrary to the Federal Respondents' suggestion (Fed. Resp. Br. at 11, n.2), it is not insignificant that the Court has decided to hear another case involving an FCC order implementing the Cable Act challenged as disregarding clear Congressional intent. *City of New York v. FCC, cert. granted*, No. 87-339 (Nov. 30, 1987).

manage to ignore the fact that the Court of Appeals, "applying the 'traditional tools of statutory construction,' *Chevron*, 467 U.S. at 843 n.9," rejected the FCC's attempt to administratively redefine "basic cable service" in determining which tiers of service are subject to regulation. (App. A155).

The Federal Respondents likewise fail to explain why the FCC could ignore the precise statutory mandate to "define the circumstances in which a *cable system* is subject to effective competition." 47 U.S.C. § 543 (b)(2)(A) (emphasis added). The FCC clearly departed from that mandate when it defined "effective competition" for "basic cable service" rather than for a "cable system." In asserting that Congress gave the FCC no precise instruction (Fed. Resp. Br. at 8), the Federal Respondents simply ignore the statutory language and its plain meaning.

The Federal Respondents suggest that review by the Court is inappropriate because the outcome of the remand proceeding could diminish the practical importance of the "effective competition" rules. (Fed. Resp. Br. at 6). This suggestion overlooks, however, the limited scope of the remand proceeding, in which the FCC apparently intends to reconsider only its signal "availability" standard and not its "effective competition" standard. Indeed, the Further Notice of Proposed Rulemaking issued by the FCC on remand is expressly limited to reconsideration of the signal "availability" standard. *Implementation of Cable Communications Policy Act of 1984*, 52 Fed. Reg. 36801 (Oct. 1, 1987). Even if 10 percent of all cable systems were to be reregulated after the remand proceeding, roughly 90 percent of all cable systems will remain deregulated.[2]

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[2] The FCC's "effective competition" rules currently preclude 1,225 (or about 99.5 percent) of the 1,231 cities that were direct members of the National League of Cities ("NLC") at the time of the proceedings below from regulating basic cable service rates. NLC Comments III at 19, ¶¶ 30-31 and Ex. B.

The Federal Respondents also suggest that this case is inappropriate for review because "the Commission is monitoring the effect of its three-signal rule . . . so that amendments can be made, if needed, and in order to report to Congress by 1990." (Fed. Resp. Br. at 6.) Such monitoring efforts are meaningless if the FCC disregards the Cable Act's unambiguously expressed intent. Respondent NCTA further suggests that Congress may amend the Cable Act if unhappy with the FCC's implementation. (NCTA Br. at 9). That speculative possibility hardly excuses the FCC's present disregard of clear Congressional intent.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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